

1 UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

2 -----x
3 UNITED STATES OF AMERICA,

4
5 versus

08 CR 415 (FB)

6 RALPH CIOFFI AND MATTHEW TANNIN,

7 DEFENDANTS.

U.S. Courthouse
Brooklyn, New York

8 -----x
November 9, 2009
10:45 a. m.

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11 TRANSCRIPT OF TRIAL

12 Before THE HONORABLE FREDERIC BLOCK,

13 UNITED STATES DISTRICT JUDGE

14 APPEARANCES

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BY: JAMES MCGOVERN, ESQ.
18 PATRICK SINCLAIR, ESQ.
ILENE JAROSLAW, ESQ.
19 BRIAN SANO, ESQ.

20 Also Present: S. A. Dengler
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21
22 Representing Ralph Cioffi: WILLIAMS & CONNOLLY, LLP
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BY: DANE BUTSWINKAS, ESQ.
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1 Appearances (continued)

2

3 Representing Matthew Tannin: BRUNE & RICHARD, LLP
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27 Proceedings recorded by mechanical stenography. Transcript
28 produced by computer-aided transcription.

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1 (In open court, outside the presence of the jury.)

2 THE CLERK: You be may be seated.

3 Criminal cause on trial, the United States of America
4 versus Ralph Cioffi and Matthew Tannin. All counsel and
5 parties are present and accounted for.

6 THE COURT: All right. Just a few little matters
7 before, hopefully the jury will be here in 15 minutes. I just
8 made a couple of fine tuning changes to the charge. And in
9 respect to the concern that good faith did not carry forth into
10 the wire fraud and the insider trading charge, and we did
11 incorporate good faith and the definition of intent in the
12 charge.

13 So I may, you know, say during my comments to the
14 jury, I may emphasize that, for example, on the wire fraud
15 charge, I said the first and second elements of wire fraud are
16 equivalent to the first and second elements of security fraud
17 with two important exceptions. I'll add, "In all other
18 respects, you are to apply my instructions in those elements,"
19 and then just say, "Including the good faith aspect." But it's
20 in there.

21 And the same with respect to the insider trading
22 charge, where I specifically told the jury to refer to my
23 instructions on the second and third element, including how I
24 defined the terms "knowingly" and "willingly" and with the
25 intent to defraud. So you need not be concerned. It's in

1 there. But I don't deliver the charge exactly verbatim, the
2 way it's written. I may just say something else about that.

3 I did add the caveat that they have to all agree as to
4 which act or acts establish venue. And other than that, I
5 think we're pretty much on the same page. So, we did that with
6 respect to the venue and both places.

7 On the verdict sheet, I think that we should, you
8 know, have the counts read numerically and how they were
9 presented in the indictment, so Count One will be the
10 conspiracy and -- instead of having it integrated after Count
11 Four.

12 And the other thing is that I think that we should,
13 you know, have for record clear, that in respect to the issue
14 about the overt act that's necessary to support venue, it's
15 true, as Ms. Keeley pointed out, that at the time that
16 Mr. Butswinkas gave his summation, the so-called revised overt
17 act charge was not in what I had handed out. And what I did
18 have initially was a correct statement, although but it did not
19 have the qualification that later appeared in the subsequent
20 draft of the charge. But the sequence of events, just so the
21 record is clear, if I recall correctly -- and if not, you'll
22 correct me -- is that Mr. McGovern did raise an objection
23 during the comments made by Mr. Butswinkas, and I said to the
24 jury, you know, you'll take the law from me as I give it to
25 you. But it is true, once again, that it did not have a

1 so-called revised proposed charge at the time that he made
2 those comments.

3 The next morning, before Mr. Butswinkas completed his
4 summation, the government did give me its submission proposing
5 a qualification to the overt act charge. So the issue is
6 before all of us, clearly, before we continued with Mr.
7 Butswinkas's summation. Then if memory serves me correctly,
8 after he finished his summation we spoke about the fact that I
9 was revising the charge. And then I gave everybody revised
10 charge with highlights on it before the lunch break, if I
11 recall correctly. I think it was maybe before or maybe during
12 Ms. Brune's summation, but it was certainly before she
13 completed her summation. So she had that before her, during
14 the lunch break, if I recall correctly.

15 I'm not commenting on what the legal ramifications
16 are. I just wanted to try to clarify the record and respect to
17 that, so in sum, Ms. Brune did have what turned out to be the
18 final take on the overt act charge during her summation. Mr.
19 Butswinkas did not have it during his summation. But I was
20 arguably alerted to the issue by reason of the objection by
21 Mr. McGovern and the submission that was received first thing
22 during the ensuing morning before he completed his remarks.

23 I think that's an accurate representation of what
24 happened.

25 MR. MCGOVERN: Yes. Agreed, Your Honor.

1 THE COURT: Agreed, everybody?

2 MS. KEELEY: Yes, Your Honor. Exactly. We're just
3 going for the record to file the draft jury charges with timing
4 as when they were received. File that later today.

5 THE COURT: It's part of my responsibilities to try to
6 make as clean a record as possible for whatever purpose it may
7 serve. And then, of course, I did offer to Ms. Keeley the
8 opportunity if she wanted to comment to the jury further on it,
9 which she respectfully declined, so we have a clear record here
10 on that.

11 Anything else that we need to attend to before the
12 Court delivers its charge to the jury?

13 All right. So we have about ten minutes, yet, before
14 the jurors were told to come. And are we pretty much agreed on
15 what the exhibit lists look like, and the witness lists, that
16 we are ready to hand to the jurors after I deliver the charge?

17 MR. SANO: I think we are, Your Honor, just a couple
18 little typos and things we're resolving.

19 THE CLERK: I have the defendant's list. So we want
20 to mark those as court exhibits. So do you, yes or no, have
21 the final now that I can identify as a court exhibit or do you
22 still have to work on it?

23 MR. SANO: We received one additional charge, Your
24 Honor, that we're incorporating, so I don't have that final
25 one. It's just, so it will be added to --

1 THE COURT: You'll be able to give the final one to
2 the, I guess --

3 MR. SANO: Very shortly.

4 THE COURT: Right. When that happens, we'll mark them
5 as court exhibits. Do we have any court exhibits yet,
6 Mr. Innelli?

7 THE CLERK: No, we don't.

8 THE COURT: All right. So, why don't we have the jury
9 charge which would go to the jurors as Court Exhibit 1, I
10 guess, right? And then we'll mark the witness list Court
11 Exhibit 2. And the exhibit list, do you have a Court Exhibit
12 3, okay?

13 THE CLERK: Okay.

14 THE COURT: All right. Do you want to mark the
15 plaintiff, well, the witness list collectively, will be Court
16 Exhibit 3.

17 THE CLERK: Uh-hum (affirmative response).

18 THE COURT: Both the plaintiffs and the defendants.

19 THE CLERK: Uh-hum (affirmative response).

20 THE COURT: All right?

21 THE CLERK: Okay.

22 THE COURT: And we'll go from there.

23 All right. So then, hopefully the jurors will be here
24 shortly and we'll give the charge to them.

25 MS. KEELEY: All right. Your Honor, we just wanted to

1 let you know that after you give the charge to the jury, we
2 just planned on filing a set of written objections to the
3 charge, based on the version we had from Friday, just to
4 preserve the record.

5 THE COURT: You've already preserved your record.
6 It's okay to wear a belt and suspenders, but you don't have to
7 really go beyond that. What are you worried about?

8 MS. KEELEY: Your Honor, there is some Second Circuit
9 precedence that states that we have to file our objections
10 after the charge is actually read, so that it's to the actual
11 charge given to the jury. We are also prepared to --

12 THE COURT: What we usually do on that is that I call
13 you over to sidebar, after we deliver the charge, and ask you
14 whether you have any objections to the charge as read, other
15 than what you already have objected to which the record will
16 reflect, you know, has been preserved, so you know, but if you
17 like to do this extra work, that's okay with me, I guess.

18 MS. KEELEY: (Nods head affirmatively.)

19 THE COURT: I can't prevent you from filing whatever
20 you want to file, but the record will be clear. I don't know
21 if you filed. It may or may not reflect what actually has
22 happened, but do as you choose.

23 I guess we'll be finished by about 12:30. The jurors
24 will be eating in. And we'll just -- Mr. Innelli will keep you
25 abreast of events and organize all of you as need be. And we

1 have no way of knowing, you know, what the jury will require.
2 Though we will be sending in the charge and the exhibit list
3 and the witness list forthwith and Mr. Innelli will intend to
4 give to the marshals and in turn to the jurors, okay. And
5 we'll wait for the jurors to tell us how long they want to
6 deliberate today, but I'm going to tell them that, you know,
7 we're really pretty much subject to their control. But I
8 expect that they will put in a full day's work and they're not
9 going to leave too early. I give them a lot of play in choice
10 in terms of when they want to come and when they want to leave.
11 We'll see what happens.

12 All right. Let's wait for the jurors and we'll be
13 back when they're here.

14 THE CLERK: Ms. Brune, did you want to put something
15 on the record?

16 Judge?

17 THE COURT: What?

18 THE CLERK: I think Ms. Brune wants to put something
19 on the record.

20 MS. BRUNE: I am speaking on behalf of both defense
21 counsel when I say that I know your usual practice is to
22 discharge the alternates, but I wondered if you would consider
23 keeping a few of them around. I'd hate to have to do this
24 again if it's unnecessary.

25 MR. MCGOVERN: We actually agree, Your Honor. If it's

1 the Court's practice to discharge them, you can discharge them
2 and tell them not to discuss the case until such time as
3 they --

4 THE COURT: What is it you want me to do, to extend to
5 the length of the deliberations?

6 MR. MCGOVERN: Just in case, if it does happen. Let's
7 say for some reason, we have, for instance, a nondeliberating
8 juror. You could call one of the alternates and bring them
9 back in and start deliberations anew, rather than have to start
10 the trial anew.

11 They would have the consent to 11, that is the issue.

12 THE COURT: I don't think we have to be concerned.
13 I'm not inclined to do that. I don't see any reason to do
14 that.

15 MR. MCGOVERN: If you were to let them go and say
16 don't discuss the case, go home. Go back to life, just don't
17 discuss the case. We'll contact and let you know when it's all
18 over or something like that. That might be --

19 THE COURT: I don't know how realistic that is.

20 MR. MCGOVERN: Hopefully, they haven't been doing it
21 thus far.

22 THE COURT: I'm not inclined to do it.

23 MR. MCGOVERN: Okay.

24 MS. BRUNE: Thank you, Your Honor.

25 (Recess.)

1 THE COURT: All right. Everyone is here. Mike, bring
2 in the jurors.

3 (Jurors enter the courtroom.)

4 THE CLERK: All rise. You may be seated.

5 THE COURT: Good morning, everybody. I'm going to
6 come down to meet you, because I like to deliver my charge
7 right here. And I do that for number of reasons. I find that
8 when the Judge is breathing down your neck, people seem to pay
9 more attention.

10 The first time I charged the jury some years ago, I
11 did it from up in the mountain, the way most of my colleagues
12 do, and I saw juror number seven -- don't take it personally --
13 was sound asleep. And that has never happened since.

14 We have water lined up. I hope you had a pleasant
15 weekend. And of course, we are here now to listen to the law.

16 And another good reason why I like to come down here
17 is I feel that at this time, more like a professor of law,
18 because I'm talking about the law, and explaining the law to
19 everybody. And the good Lord did not give me a booming voice.
20 So I find that if I'm close to the jurors, they can hear me
21 better.

22 So, the charge is the divided into three parts. And
23 while it's perfectly okay for you to take notes as I've told
24 you and a number of you have done that throughout the trial,
25 fear not, because as I mentioned to you, I will actually give

1 you the written charge which you can use as a guide. But, if
2 you're comfortable in taking notes, as we go along, by all
3 means, that's perfectly okay as well.

4 And out of respect to the written charge, I'm going, I
5 don't have a teleprompter. They don't give us a teleprompter
6 like the president of the United States has. So I'm going to
7 try to make as much eye contact with you as possible.

8 But, I do have the charge written out. That as you
9 can tell, I don't necessarily follow this script exactly. I'm
10 talking to you so, you know, it's spontaneously right now.
11 Probably do that periodically throughout the charge. But,
12 substantively, what I say to you, hopefully, is going to be
13 exactly correct, and if I say anything to you that's at
14 variance with what you will read on the written page, which is
15 simply a guide, then it's what I'm telling you orally in court
16 that is the real charge. Just, bear that in mind.

17 The law requires Judges to speak to the jurors, and to
18 deliver the charge orally and allows us once again to allow you
19 to see the written charge as a guide, with the admonitions that
20 I just gave you.

21 All right. So the way we structure charges is to
22 divide them into three parts. The first part talks about the
23 general principals that apply to just about every case, where
24 somebody is charged with a crime. I will explain the burden of
25 proof again, and you know, the ABC's, so to speak, of what the

1 criminal trials are all about. The second part will focus on
2 explaining the elements of the various charges here, that
3 constitute the allegations against the defendant, and will
4 explain the law to you with respect to security fraud, wire
5 fraud, conspiracy, insider trading.

6 And then the last part will explain how you go about
7 your deliberations, the selection of a foreperson.

8 Ms. McCoffey (phontic), is that how you pronounce your
9 name?

10 JUROR: McCoughey.

11 THE COURT: McCoughey. You're in seat number one.
12 You don't have to be the foreperson, you can be the foreperson,
13 you'll select amongst yourselves who will be your spokesperson,
14 so to speak, and the foreperson is the one that has to stand in
15 court and deliver the charge after you reach your unanimous
16 verdict to each of these counts.

17 And we'll talk a little bit about that during our
18 concluding remarks and how exactly you go about your
19 deliberations. What to do if you have any questions that you
20 would like to ask during your deliberation that, so basically
21 that is the structure of the charge.

22 All right. So now, as far as the general
23 instructions, some of this will be repetitious, but I think
24 it's okay to have repetition at this particular time in the
25 proceedings when everything is being summed up, so to speak.

1 So, first you must accept my instructions as the law and apply
2 them to the facts as you determine them. You have been told
3 that before. If any attorney has stated a legal principle
4 different from any that I state to you in my instructions, my
5 instructions are what you must follow. You have been told that
6 as well before. You should not single out any instruction as
7 alone stating the law, you should consider my instructions as a
8 whole.

9 Now, we know our respective roles. I will remind you
10 once more at this time, you are the sole and exclusive judges
11 of the facts. That means you pass upon the weight of the
12 evidence, you determine the credibility of the witnesses. You
13 resolve such conflicts as there may be in their testimony and
14 you draw whatever reasonable inferences you decide to draw from
15 the facts as you have determined them. And I'll just go over
16 all of those with you in due course.

17 In determining the facts, you must rely upon your own
18 recollection of the evidence, once again, what lawyers have
19 said in their opening statements, in their closing arguments,
20 in their objections, or in their questions, none of that is
21 evidence. In this respect, you should bear in mind once again
22 that a question put to a witness is never evidence and I told
23 you about that in a number of occasions during the course of
24 the trial. Be mindful just because a fact is absorbed in the
25 question, doesn't mean that is evidence, just the answer is

1 what really constitutes the evidence.

2 Nor is anything I may have said during the trial or
3 may say during these instructions with respect to a matter of
4 fact to be taken as substitution for your own independent
5 recollection, because what I say is not evidence either.
6 Neither is the indictment evidence, you have been told about
7 that. The evidence before you, therefore, consists of the
8 answers given by the witness, that is the testimony they gave
9 as you recall it, and the exhibits and the stipulations that
10 were received in evidence.

11 Now, since you're the sole and exclusive judges of the
12 facts, I do not mean to indicate any opinion as to the facts or
13 what your verdict should be. The rulings I've made during the
14 trial are not any indication of my views of what your decision
15 should be as to whether or not the guilt of the defendant or
16 either of the defendants has been proven beyond a reasonable
17 doubt. You expressly understand that I have no opinion as to
18 what your verdict should be.

19 Under your oath as jurors, you are not to be swayed,
20 of course, by fear, prejudice, bias, or sympathy. It should be
21 clear to you that once you let fear, prejudice, bias or
22 sympathy interfere with your thinking, there is a risk that you
23 are not going to arrive at a true and just verdict. In a
24 similar vein, it would also be improper to base your verdict on
25 any sympathy or prejudice you may have about either defendants'

1 race or religion, national origin, sex or age.

2 Those are obvious things, but I always feel better
3 saying it, just to remind us how we have to just take any of
4 these issues out of the case.

5 Now, the fact that the prosecution has brought in the
6 name of the USA, entitles the government to no greater
7 consideration than that accorded to any other party in the
8 litigation. By the same token, it is entitled to no less
9 consideration. All parties whether the government or
10 individuals like the defendants stand equal at the bar of
11 justice, sometimes people think a government gets a leg up
12 because it is the government, everybody is on the same level
13 playing field.

14 Now, as you know, there are two defendants in the
15 trial, Mr. Cioffi, Mr. Tannin, your verdict must be determined
16 separately with respect to each of these defendants based upon
17 the evidence or lack of evidence presented against the
18 defendant and without regard to the guilt or innocence of
19 anyone else. When I refer to a defendant, or the defendant in
20 my instructions, I am obviously referring to each defendant
21 separately. Each defendant has to be separately evaluated with
22 respect to each of the charges against that defendant.

23 Now, let's talk again about the burden of proof, the
24 presumption of innocence. We spoke about this in my
25 preliminary comments. This is a proper time for me to remind

1 you of that.

2 The law presumes a defendant to be innocent of all the
3 charges against him. I instruct you, therefore, that the
4 defendant, once again, is to be presumed by you to be innocent
5 throughout your deliberations on each count in which he's
6 charged until such time, if ever, you as the jury are
7 satisfied that the government has proven him guilty beyond a
8 reasonable doubt.

9 Thus, the defendant, although accused of the crimes in
10 the indictment, begins the trial with a clean slate, that is,
11 with no evidence against him. The indictment, once again, as
12 you know, is not evidence of any crime. And the defendant, of
13 course, is not on trial for any act or crime not contained in
14 the indictment. The law permits nothing but legal evidence
15 presented before you folks, the jury, in court to be considered
16 in support of any charge against a defendant.

17 Now, as you know the burden is always upon the
18 government to prove guilt beyond a reasonable doubt. That
19 burden never shifts to the defendant, or the law never imposes
20 upon a defendant in a criminal case, the burden of duty of
21 calling any witnesses or producing any evidence. A defendant
22 may not even be obliged to produce any evidence by
23 cross-examining the witnesses for the government. The
24 presumption of innocence alone, therefore, is sufficient to
25 acquit a defendant. That's something you have been told time

1 and time again, and of course the defendants have a right to
2 participate in the trial and you observed how they chose to
3 exercise that right.

4 It is required that the government prove guilt beyond
5 all possible doubt. The test is one of reasonable doubt. What
6 is a reasonable doubt. It's a doubt based upon reason and
7 common sense. The kind of doubt that would make a reasonable
8 person hesitate to act. So proof beyond a reasonable doubt
9 must therefore be proof of such a convincing character, that a
10 reasonable person would not hesitate to rely and act upon it in
11 the most important of his or her own affairs. You should
12 consider all the proof presented at trial or the lack of proof
13 in determining if you have a reasonable doubt.

14 So we consider each count in the indictment, against
15 each defendant, unless the government proves beyond a
16 reasonable doubt that the defendant has committed each and
17 every element of the offense charged in the count, you must
18 find the defendant not guilty of the particular offense. If
19 you view the evidence with respect to counts that you're
20 considering it's reasonably permitting either of two
21 conclusions, that's one of innocence, the other of guilt, you
22 must adopt the conclusion of innocence. This does not mean, of
23 course, that the government's burden of proof is ever less than
24 proof beyond a reasonable doubt.

25 Now, if I admitted any evidence for a limited purpose

1 and I did that, I specifically recall at least one situation,
2 you must consider it only for that purpose. Now, for example,
3 the government offered evidence concerning a pledge of Mr.
4 Cioffi's hedge fund account in Bussey Bank, this evidence may
5 be considered only to evaluate Mr. Cioffi's motive to transfer
6 his hedge funds assets. Mr. Cioffi is not charged with
7 defrauding Bussey Bank or committing any propriety in the
8 dealings with that bank. So you may not consider that as
9 evidence of the guilt. Nor is Mr. Cioffi charged with
10 defrauding Bear Stearns Asset Management or committing any
11 impropriety with regard to Bear Stearns Asset Management's
12 evaluation, approval or disapproval of the pledge. So you,
13 likewise, may not consider that as evidence of guilt.

14 Consider the evidence regarding the pledge only for
15 the limited purpose of assessing the motive and ignore it for
16 all other purposes.

17 There are two types of evidence which you may properly
18 reconsider. And one is called direct evidence, and the other
19 is called circumstantial evidence and I'm sure you have heard
20 of the phrase circumstantial evidence many times. And, but let
21 me explain to you what it is. Before we get to that, direct
22 evidence is obviously what it sounds like. It's where a
23 witness testifies as to what he or she saw, heard or observed,
24 in other words, when witnesses testify about what they know by
25 virtue of their own senses, that is what they can see, hear,

1 feel or touch, that's called direct evidence. You have direct
2 evidence of me speaking to you now.

3 So what is circumstantial evidence, it's simply
4 evidence which tends to prove a disputed fact by proof of other
5 facts. And the best way to drive that home is to give you the
6 kind of example that me and my colleagues usually give to the
7 jurors. You're sitting in the room right now, I can look out
8 here, and I can see a little bit of what the weather is like
9 but you can't, you're looking straight ahead, there are no
10 windows. The last direct evidence you had of the weather was
11 when you came in through the courthouse this morning and you
12 have direct evidence that the sun was shining and indeed it's a
13 beautiful day. But, if you saw somebody walk through the door
14 right now with an umbrella -- which they would not be doing
15 today -- that you have direct evidence of that, but you don't
16 know what the weather is like right now. It may have changed.

17 If you see a few minutes later somebody coming in with
18 a rain coat dripping wet, you have direct evidence of that.
19 But once again, you still don't know whether it's sunny outside
20 or whether it would be raining. But based upon those
21 circumstances, people walking in with the umbrella and the rain
22 coat, you may the draw the conclusion that it's no longer a
23 sunny day outside. That's what we talk about when we speak
24 about circumstantial evidence. Once again, it's evidence which
25 tends to prove a disputed fact by proof of other facts. You

1 might say it's one step removed.

2 The circumstantial evidence is no less valued than
3 direct evidence, it's a general rule that the law makes no
4 distinction between direct and circumstantial evidence. But
5 simply requires that before a convicting a defendant, the jury
6 must be satisfied of the defendant's guilt from all of the
7 evidence in the case.

8 Now, you should consider the evidence in light of your
9 common sense and experience and you may draw as I mentioned
10 before reasonable inferences from the evidence.

11 There are times when there are different inferences
12 that may be drawn from facts whether proven by direct or
13 circumstantial evidence. The government asks you to draw one
14 set of inferences while the defense asks you to draw another.
15 It's for you and you alone to decide what inferences to draw,
16 if any. Now, the process of drawing inferences from facts and
17 evidence is not a matter of guess work or speculation. An
18 inference is a deduction or conclusion which you, the jury, are
19 permitted but not required to draw from the facts which have
20 been established by either direct or circumstantial evidence.

21 In drawing inferences you should exercise your common
22 sense. So when you consider the evidence, you're permitted to
23 draw from the facts which you find to be proven. Such
24 reasonable inferences, as would be justified in light of your
25 experience. But let me remind you once again that whether

1 based upon direct or circumstance evidence or the upon the
2 logical reasonable inferences drawn from such evidence, you
3 must be satisfied with the defendants' guilt beyond a
4 reasonable doubt, before you may convict.

5 Now, let me just pause now to emphasize with you, the
6 difference between inference on the one hand and speculation on
7 the other hand. That's not actually in the written draft, but
8 I want stop to explain that to you. Because a lot of times
9 people's curiosity gets the best of them and they wonder why
10 wasn't this person called as a witness. Why did this happen,
11 why didn't that happen. And they speculate. And that's not an
12 inference, that's just idle guesswork. And that would be
13 improper.

14 Now, I speak to the jurors afterward, I remember one
15 case some years ago when the jurors shared with me something
16 which they thought was important and I said that there is no
17 evidence of that in this case whatsoever. That's idle
18 speculation. And they felt very badly about that. And I said
19 that not only that, but your speculation is incorrect.
20 Somebody may be not called as witness, for example, you don't
21 know why, maybe the person died, maybe they're in the hospital,
22 they could be a host of reasons why that may not have happened
23 many. But if you're engaged in speculation, and let that into
24 deliberations, then you're doing something very improper.

25 Bear in mind, and I'll tell you, most of the time when

1 speculate they're wrong. So not only should you not speculate,
2 but you really run the risk of arriving at an improper verdict
3 if you engage in speculation.

4 Inferences from the evidence, direct or
5 circumstantial, logically drawn, yes, that's something you are
6 permitted to do if you choose to do so, but idle speculation,
7 absolutely not, and I think you understand why I pause to
8 explain to you the difference. Because during your
9 deliberations, just check yourself out, are we speculating here
10 or is this really based upon evidence in the trial or the
11 logical inference that can be drawn from the evidence. So
12 that's the heads up I wanted to share with you.

13 Now, how about credibility? How do you go about
14 sizing up the credibility of a witness? That's part of your
15 fact finding responsibilities, as I told you. And remember,
16 you know, that that is a part of your responsibilities, you are
17 the sole judges of their credibility and the importance of the
18 testimony of the witnesses. You remember, once again, that the
19 burden of proof is always on the government. The defendant is
20 not required to call any witnesses or offer any evidence
21 because of the presumption of innocence.

22 So it must be clear to you by now, that you will be
23 called upon to resolve various factual issues under the
24 indictment in the face of very different pictures painted by
25 the government and the defense which cannot be reconciled.

1 That's why we need you.

2 An important part of your decision will involve making
3 judgment about the testimony of the witnesses you have listened
4 to and observed. In making those judgments, you should
5 carefully scrutinize their testimony, the circumstances under
6 which the witnesses testified, and any other matter in evidence
7 which may help you to decide the truth and the importance of
8 the witness' testimony. So here's some common sense guides,
9 guidelines you can engage in.

10 Your decision whether or not to believe a witness may
11 depend on how the witness impressed. Was the witness candid,
12 frank and forthright? Did the witness seem as if he or she was
13 hiding something, being evasive or suspect in some way? How
14 did the way the witness testified on direct compare with how
15 the witness testified on cross or redirect or recross, in other
16 words, during the entirety of the witness' testimony? Was the
17 witness consistent in his or her testimony or did he or she
18 contradict himself or herself? Did the witness appear to know
19 what he or she was talking about? Did the witness strike you
20 as someone who was trying to report his or her knowledge
21 accurately? Was the witness perhaps honest but nonetheless
22 mistaken?

23 How much you choose to believe a witness may be
24 influenced by the witness' bias. Does the witness have a
25 relationship with the government or the defendant which may

1 affect how she or she testified, does the witness have some
2 incentive, loyalty or motive that might cause the witness to
3 shade the truth? Does the witness have some bias, prejudice or
4 hostility that may have caused the witness, either consciously
5 or not, to give you something other than the completely
6 accurate account of the facts about which this the witness
7 testified?

8 Now, even if the witness was impartial, you should
9 consider whether the witness had an opportunity to observe the
10 facts that the witness testified about. You should also
11 consider the witness' ability to himself or herself. You may
12 ask yourselves whether the witness' recollection of the facts
13 stand up in light of all the other evidence. If any witness is
14 shown to have willfully lied on the witness stand about any
15 material matter, not an inconsequential matter, something of
16 some significance, you have the right to conclude he or she
17 also lied about other matters. You may disregard all the
18 witness' testimony, or you may accept whatever part you think
19 deserves to be believed, it's up to you to determine whether
20 the witness testified falsely and whether he or she did so
21 deliberately.

22 It's entirely up you to do determine the weight, if
23 any, that should given to the testimony of such a witness on
24 the basis of all of the evidence and once again, your God given
25 common sense.

1 In sum, what you must try to do in deciding
2 credibility is to size a person up in light of his or her
3 demeanor, the explanations given, and the other evidence in the
4 case, just as you would any important matter where you're
5 trying to decide if a person is truthful, straight forth and
6 accurate in his or her recollection. In deciding the question
7 of credibility, remember, once again, you should use your
8 common sense, your good judgment, and you may use your life
9 experiences.

10 Now, one of the witnesses called by the government
11 works for the Federal Bureau of Investigation. That a witness
12 may be a law enforcement official does not mean that his or her
13 testimony is deserving of more or less consideration or greater
14 or lesser weight than that of an ordinary witness. It's for
15 you to decide after weighing all the evidence in light of the
16 instructions that I have given you about the factors relevant
17 in determining the credibility of a witness when you accept the
18 testimony of a witness who's a law enforcement official and
19 what weight, if any, it deserves. I think the person we're
20 talking about is Agent Dengler.

21 You have heard from experts, an expert is allowed to
22 express his opinion, those matters about which he has special
23 knowledge and training. Expert testimony is presented to you
24 on the theory that someone who is experienced in the field can
25 assist you in understanding the evidence on reaching an

1 independent decision on the facts.

2 Now, in weighing an expert's testimony, you may
3 consider the expert's qualifications, his opinions and reasons
4 for testifying, as well as all of the other considerations that
5 ordinarily apply when deciding whether or not to believe a
6 witness' testimony. You may give the expert testimony whatever
7 weight, if any, you find it deserves in light of the evidence
8 in the case. You should not, however accept the witness'
9 testimony merely because he's an expert, nor should you
10 substitute it for your own reasonable judgment and common
11 sense.

12 Now, there has been reference throughout the trial, if
13 I recall correctly, to interviews that the attorneys for the
14 government conducted with witnesses prior to the witnesses
15 testifying, you may not draw any unfavorable inference from
16 that conduct. I instruct you that the attorneys not only have
17 a right to interview witnesses prior to putting them in the
18 witness seat, but it's their responsibility to do so in order
19 to prepare their case as thoroughly as possible.

20 Now, the attorneys for the government and the
21 attorneys for the defendants have entered into stipulations
22 concerning certain facts that are relevant to the case. When
23 the attorneys on both side stipulate and agree as to existence
24 of a fact, you must accept the stipulation and regard that fact
25 as proven.

1 Now, there is no legal requirement that the government
2 use any specific investigative techniques or pursue every
3 investigative lead. Law enforcement techniques are not your
4 concern. The law also does not require the government to call
5 as witnesses all persons who may have been present at any time
6 or place involving the case. Or who may appear to have some
7 knowledge of the matters at issue. Nor does the law require
8 the government to produce as exhibits all papers or things
9 mentioned during the course of the trial.

10 You have heard testimony as to other individuals, lots
11 of names were bandied about during the course of the trial.
12 Now, these individuals are not on trial before you. It's not a
13 matter of concern to you. Watch the word speculation there,
14 okay?

15 Now, you know that the defendants did not testify.
16 And you know that under our Constitution, the defendant has no
17 obligation to testify, or to present any other evidence because
18 it's the government's burden to prove a defendant's guilt
19 beyond a reasonable doubt. That burden remains with the
20 government throughout the entire trial and never shifts to the
21 defendant. The defendant is never required to prove that he's
22 innocent, and no negative inference can drawn against him
23 because he did not testify.

24 Let me pause again to emphasize that because I told
25 you that in my preliminary remarks and you all know that, but

1 you have to guard against you know what could be a human
2 tendency to say why didn't the defendant get up and testify.
3 Defendant has an absolute right to rely on upon the
4 Constitution of the United States. And you can't draw any
5 inferences against the defendant who decides to, you know, rely
6 upon the Constitution of the United States. If you did that,
7 you would be violating your oath of office by not applying the
8 law, if you were holding that against the defendant for relying
9 on the Constitution of the United States. You can't do that.

10 So check yourself out. And I'm really, you know, in
11 my mind, thinking that, you know, maybe the defendant should
12 have testified. And holding that against the defendant, you
13 just can't do that. But human nature being what it is, you
14 know, there may be a hesitation to do that, but that's why I
15 stopped to emphasize that terribly important principle of our
16 constitution, so you're aware of that and be conscious of that
17 during your deliberations.

18 All right. Now, with those preliminary instructions
19 in mind, let's turn to the charges against the defendant as
20 contained in the indictment. I remind you that for about the
21 tenth time the fact in itself is not evidence, and the reason
22 why I remind you of that over and over again is because there's
23 also a tendency to say if somebody's been indicted, they must
24 have done something wrong. So you have to resist that
25 temptation, as well.

1 So we've got to merely describe the charges made
2 against the defendant. There is an accusation, and nothing
3 more, and may not be considered by you as any evidence or
4 suggestion of guilt.

5 Now, the indictment charges that the offense allegedly
6 took place on or about certain dates. The proof need not
7 establish with certainty the exact date of the alleged offense.
8 It is sufficient that the evidence proves that the offenses
9 were committed on a date reasonably near the date alleged.

10 That concludes the general instructions. You can
11 understand what I meant when I say that these are principles
12 that broadly apply in most criminal cases. All right.

13 You'll see that in the written document which I'm
14 going to give you, we have the headings and that is used to aid
15 you. Once again, it's not an indication of what your
16 deliberations should be. And there will be a table of contents
17 that will be given to you, as well, to aid you in that respect.

18 Now, what I do at this particular time is I take my
19 first sip of water and assure the jury that it is water.

20 The longest charge I ever gave was eight hours.
21 Believe it or not, it was a 64-count indictment. And during
22 the course of that, I wished there was something other than
23 water in that glass.

24 This not going to be too long. It's all important.
25 They're all important, but it depends on the nature of the

1 case, of course.

2 So now to the legal elements. Let me give you this
3 general overture first. The defendants -- the indictment
4 charges both defendants with security fraud, wire fraud, and
5 conspiracy to commit second fraud and wire fraud. There are
6 two security fraud counts.

7 In addition, it also charges Mr. Cioffi with insider
8 trading. Mr. Tannin is not involved in that at all. He's not
9 being charged with insider trading.

10 You should consider each count and the evidence
11 pertaining to it separately. Your verdict as to any one count
12 does not determine your verdict as to any other count. Okay.

13 Now, I'm going to first explain to you counts two and
14 three. Which are the two security fraud counts. And then I'm
15 going to explain the wire fraud counts and then I'm going to
16 explain the conspiracy counts which relates to the these counts
17 or I think it's going to be easier for you to follow the
18 bouncing ball if I first explain the substantive counts. When
19 we refer them as substantive counts it is the conspiracy
20 counts, is also, you know, a criminal charge. But, you have to
21 have a sense of what the underlying substantive counts are in
22 order to fully comprehend a conspiracy count. So I'll give you
23 that first.

24 Counts two and three charge both defendants with
25 securities fraud. Count two charges the security fraud in

1 connection with a High Grade Fund, and it reads as follows:
2 "In or about and between March 2007 and June 2007, March
3 through June, both defendants being proximate and inclusive,
4 within the Eastern District of New York and elsewhere, the
5 defendants, Ralph Cioffi and Matthew Tannin, did knowingly and
6 willfully use and employ manipulative and deceptive devices and
7 contrivances in that the defendants knowingly and willfully, A,
8 employed devices, schemes and artifices to defraud, B, made
9 untrue statements to material fact, and omit to state material
10 facts necessary in order to make the statements made. In light
11 of the circumstances of which they were made, not misleading
12 and C, engaged in acts, practices and courses of business which
13 would and did operate as a fraud and deceit upon members of the
14 investing public in connection with the purchases and sale of
15 shares of the High Grade Fund directly and indirectly by use of
16 the means and instrumentalities and interstate commerce, the
17 mails."

18 That's a lot of words. I'm going to break it down and
19 explain these things to you, but that's the way the indictment
20 reads. And sort of has like a lot of arcane language in it,
21 but we're going to explain each of these elements to you.

22 All right. So, count three is identical to count two
23 except it charges security fraud in connection with the
24 purchase and sale of shares of the Enhanced Leverage Fund, so,
25 count two deals with the High Grade Fund, count three with the

1 Enhanced Leverage Fund, separate charges, they each relate to a
2 separate fund.

3 In order to meet its burden of proof with respect to
4 counts two and three, the government must establish beyond a
5 reasonable doubt the following three element as to each count
6 which you are going to consider as to each of these funds.
7 First, that on or about the dates set forth in the indictment,
8 in connection with the purchase or sale of particular
9 securities, the defendant you're considering did at least one
10 of the following: A, employed a device, scheme, or artifice to
11 defraud, or B, made an untrue statement of material fact or
12 omitted to state a material fact, which made what was said
13 under the circumstances misleading, or C, engaged in an act,
14 practice or course of business that operated or would operate
15 as a fraud or deceit upon a purchaser or seller.

16 That's the first element. The second one is that the
17 defendant acted willfully, knowingly, and with the intent to
18 defraud. And the third element, is that the defendant
19 knowingly used or caused to be used, A, any means or
20 instruments of transportation or communication in interstate
21 commerce, B, the mails, or C, any facility of any national
22 securities exchange in furtherance of the scheme.

23 I'm now going to explain each of those to you.

24 As I just told you with respect to first element, the
25 government must prove beyond a reasonable doubt that the

1 connection with the purchase or sale of shares of the High
2 Grade Fund, that is count two, and the Enhanced Leverage Fund,
3 that's count three, the defendant you are considering did at
4 least one of following: A, employed a device, scheme or
5 artifice to defraud, or B, made an untrue statement of a
6 material fact or omitted to state a material fact which made
7 what's said under the circumstances misleading. Or C, engaged
8 in an act, practice or course of business that operated or
9 would operate as a fraud or deceit upon a purchaser or seller.

10 Now, it's not necessary for the government to
11 establish all three types of unlawful conduct. Finding any one
12 of these three types of fraudulent conduct is sufficient. But
13 you must be unanimous as to which type of unlawful conduct, if
14 any, you find to have been proven.

15 Let me talk to you now about these three types of
16 fraudulent conduct. Subsections A and C are fairly
17 self-explanatory, but let me define some of the terms
18 mentioned.

19 To begin with, fraud and to defraud, are general terms
20 which embrace all efforts and means that individuals devise to
21 take advantage of others. Fraud includes all kinds of
22 manipulative and deceptive acts. In simplest terms, it means a
23 lie or a trick.

24 Now, a device, scheme or artifice is simply a plan for
25 the accomplishment of any objective. To prove that the

1 defendant you're considering employed a device, scheme or
2 artifice to defraud, or that he engaged in any act, practice or
3 course of business that operated as a fraud or deceit, the
4 government must establish that the defendant committed at least
5 one deceptive act or practice distinct from any alleged
6 misrepresentations and you must be unanimous about which, if
7 any, of those deceptive acts were committed.

8 Section B requires more evaluation. With regard to
9 alleged misrepresentations and omission, you must consider
10 whether the statements were false when made, and in the case of
11 alleged omissions, whether the omission, that is the failure to
12 reveal information, made things that were said misleading. The
13 government need not prove that the defendant personally made a
14 false statement or misleading omission. It is sufficient the
15 government establishes that the defendant intended to cause a
16 false statement or misleading omission to be made. However,
17 the government must prove that the defendant you're considering
18 made or caused to be made at least one false statement or
19 misleading statement, or misleading omission. And you must be
20 unanimous as to which statement or omission that was.

21 So it is not sufficient to convict under subsection B
22 if some of you find that the government has proven one
23 particular false statement or misleading omission or others
24 find the government has proven another. In other words, you
25 must be on the same page.

1 An alleged false statement or misleading omission must
2 involve a matter of fact. Opinions and predictions do not a
3 qualify unless they are worded as guarantees or unless they're
4 accompanied by an express or implied assertion of fact about
5 the subject matter of the opinion or prediction. Similarly, a
6 promise to perform an act in the future does not qualify as a
7 misrepresentation unless there's no intention to perform the
8 act when the promise was made. The fact that the promised act
9 was not performed does not, standing alone, establish an intent
10 not to perform the act when the promise was made.

11 If you find that the government has established beyond
12 a reasonable doubt that there was a false statement or
13 misleading omission, you must determine whether the fact
14 misstated or omitted was material under the circumstances. A
15 material fact is one that would have been significant to a
16 reasonable investor in making an investment decision regarding
17 the fund at issue. In other words, the High Grade Fund with
18 respect to count two and the Enhanced Leverage Fund with
19 respect to count three.

20 Once you find that there was a misrepresentation or
21 misleading omission regarding a material fact, it doesn't
22 matter whether the intended victim was gullible or careless or
23 sophisticated investors.

24 Your consideration of materiality must be based on the
25 facts existing when the alleged misrepresentations were made.

1 Materiality cannot be judged by hindsight.

2 A false statement or misleading omission cannot be
3 material if it constitutes mere puffery or sales talk that no
4 reasonable investor would consider important to the total mix
5 of information available in making an investment decision
6 regarding the fund at issue.

7 Similarly, statements of optimism are not considered
8 material if they are accompanied by appropriate cautionary
9 language or disclosures.

10 Now, with respect to all three types of fraudulent
11 conduct, the A and the B and the C that I have explained to
12 you, you must also determine whether the government has proven
13 beyond a reasonable doubt that the alleged conduct was in
14 connection with the purchase or sale of securities. Shares in
15 the High Grade Fund and shares in the Enhanced Leverage Fund
16 are both securities.

17 The government need not prove that a defendant was or
18 would be the actual seller of the securities. Nor does it have
19 to prove that the fraudulent or deceitful conduct alleged
20 related to the value of the securities at issue. The in
21 connection with requirement, quotes around the phrase "in
22 connection with," is satisfied as long as the allegedly
23 fraudulent conduct or some relationship to, and we touched upon
24 the purchase or sale of securities.

25 If you find that the defendant you're considering

1 fraudulently induced an investor to buy or sell the security at
2 issue, or to refrain from buying or selling the security, then
3 the "in connection with" requirement has been satisfied.

4 Now, as I told you, the securities at issue in count
5 two of shares of the High Grade Fund, securities at issue in
6 count three are shares of the Enhanced Leverage Fund. For each
7 count the government must prove fraudulent conduct as I defined
8 it for you with respect to the particular security charged in
9 count. You should consider the totality of the evidence in
10 making that determination.

11 Let me conclude by my instruction on this first
12 element by explaining some things that are not relevant to your
13 deliberations. It's no defense to an overall scheme to defraud
14 the defendant you're considering is not involved in the scheme
15 from it's inception or played only a minor role in the scheme,
16 it's also not a defense that investors did not rely upon
17 material misrepresentations or the misleading omissions.
18 Reliance by an investor is not an element of the offense of
19 securities fraud, as I have defined it for you. You may,
20 however, consider reliance or lack of reliance in assessing
21 materiality.

22 Nor does it matter whether the alleged fraudulent
23 conduct was or would have been successful or whether the
24 defendant profited or would have profited as a result of the
25 alleged scheme. Success is not an element of the crimes

1 charged. However you find that the defendant did proffer
2 through the alleged scheme, you may consider that in relation
3 to the element of intent. Which I will now discuss with you.

4 Because that's part of the second element.

5 I'm sure as you're sitting here, you're probably
6 saying, "I'm glad Judge Block is going to give us a copy of
7 this," right? Remember, what I say is what counts. If you are
8 confused about anything -- there is a lot here obviously you
9 need to digest. You can always come back into the courtroom.
10 And I will say that to you again at my concluding comments and
11 ask me, don't guess. If you're confused, that's what I'm here
12 for, to help you out, okay.

13 The second element that the government must establish
14 beyond a reasonable doubt as to both counts, in Counts 2 and 3,
15 that the defendants you are considering participated in a
16 scheme to defraud knowingly, willfully and with the intent to
17 defraud.

18 Now, to act knowingly means to act purposely and
19 voluntarily, and not because of ignorance, mistake, accident or
20 other innocent reason. To act willfully means to act knowingly
21 and purposely with intent to do something the law forbids.
22 That is to say with a bad purpose either to disobey or
23 disregard the law. To act with an intent to defraud in the
24 context of this case simply means to act knowingly with an
25 intent to deceive investors.

1 The question of whether a person acted knowingly,
2 willfully and with intent to defraud is a question of fact, of
3 course, for to you determine, like all facts.

4 This question involves a person's state of mind. As
5 such, direct proof of knowledge of fraudulent intent is almost
6 never available. It would be a rare case where it could be
7 shown that a person wrote or stated that as of a given time in
8 the past he committed an act with fraudulent intent. So such
9 direct proof is not required. The ultimate facts of knowledge
10 and criminal intent, though subjective, may be established by
11 circumstantial evidence, based upon a person's outward
12 manifestations, his words, his conduct, his acts, and all the
13 surrounding circumstances disclosed by the evidence and the
14 rational or logical inferences, not speculation, inferences
15 that may be drawn there. Of course like any other element, the
16 defendant's knowledge and intent must be established beyond a
17 reasonable doubt.

18 Since the essential element of the crime's charge is
19 intent to defraud, it follows that good faith on the part of
20 the defendant is a complete defense to a charge of securities
21 fraud. A defendant, however, has no burden to establish a
22 defense of good faith, the burden is on the government to prove
23 fraudulent intent, and consequent lack of good faith beyond a
24 reasonable doubt.

25 Under the securities laws, even false statements or

1 misleading omissions regarding material facts do not amount to
2 fraud unless done with fraudulent intent. However deceptive or
3 misleading a plan may be, it is not fraudulent if it was
4 devised or carried out in good faith. An honest belief in the
5 truth of the representations made by a defendant is a good
6 defense, however inaccurate the statements may have turned out
7 to be. On the other hand, an honest belief that everything
8 would work out so that no one would lose any money does not
9 equate to good faith if the defendant acted with an intent to
10 deceive. No amount of honest belief that a scheme will benefit
11 investors will excuse fraudulent actions or statements in
12 carrying out the scheme.

13 Now, to conclude on the first element, if you find
14 that the defendant you're considering was not a knowing
15 participant in the scheme, and lacked the intent to deceive,
16 you must acquit that defendant. If, however, you find that the
17 government has established beyond a reasonable doubt the first
18 two elements, then you should proceed to determine whether the
19 government has established beyond a reasonable doubt that the
20 third element, which I will now instruct, you must determine
21 whether the government has also established beyond a reasonable
22 doubt the third element, which I will now explain.

23 You have the first two elements, the first one of
24 those -- three different means by which security frauds can be
25 committed, the A, B and C. You have to evaluate each of them,

1 and if you find that there was any one of those three, A, B or
2 C, that had been established by proof beyond a reasonable doubt
3 in connection with the purchase or sale of securities, as I
4 explained that to you.

5 That is the first element. The second element deals
6 with willful knowledge, fraudulent intent as I just explained
7 that to you.

8 What is the third element? The use of interstate
9 commerce or facilities or national securities exchange. So,
10 the third element that the government must prove beyond a
11 reasonable doubt as to Counts Two and Three, that the defendant
12 you are considering knowingly used or caused to be used the
13 mails or other instrumentalities of interstate commerce, which
14 is the telephone, fax machine, email, or private delivery
15 service, or any facility of a national securities exchange, in
16 furtherance of the alleged fraudulent conduct.

17 It is not necessary that the defendant you are
18 considering be directly or personally involved in any mailing
19 or use of an instrumentality of interstate commerce. If a
20 defendant was an active participate in the scheme and took
21 steps or engaged in conduct which he knew or could reasonably
22 foresee would naturally and probably result in use of the mails
23 or other instrumentalities of interstate commerce, or of any
24 facility of a national securities exchange, then you may find
25 that he caused such means to be used.

1 When one does an act with the knowledge that the use
2 of interstate means of communication will follow in the normal
3 course of business, or where such use can reasonably be
4 foreseen, even though not actually intended, then he causes
5 such means to be used. Nor is it necessary that the items sent
6 through the mails or the communications conveyed in the
7 instrumentalities of interstate commerce contain the fraudulent
8 material, or anything criminal or objectionable. The items
9 sent through the mails or the communications conveyed in the
10 instrumentalities of interstate commerce may be entirely
11 innocent.

12 The use of the mails or instrumentalities of
13 interstate commerce need not be central to execution of the
14 scheme, and even may be incidental to it. All that is required
15 is the use of the mails or other instrumentalities of
16 interstate commerce, such as a telephone, fax machine, email or
17 private delivery service or any facility of a national
18 securities exchange, bear some relation to the object of the
19 scheme or fraudulent conduct. We call that interstate
20 commerce.

21 Let me pause again. You've heard about venue. Let me
22 explain that to you.

23 In addition to the three elements that I just
24 explained to you, you must consider whether the government has
25 proven venue. That is, whether any act in furtherance of the

1 crimes charged in Counts two and three occurred within the
2 Eastern District of New York.

3 Now, I instruct you that the Eastern District of New
4 York includes Brooklyn, Staten Island, Queens and the two
5 counties that we refer as to Long Island, Suffolk and Nassau.
6 And we draw our jurors from the Eastern District of New York.

7 You might be curious to know that, if I remember
8 correctly, there are 94 districts throughout the United States.
9 This is supposed to be somewhat representative of the
10 population, not always equally populated in New York.

11 We have four districts, the east, west, north and
12 south -- eastern and western and southern and northern. The
13 Southern District is in Manhattan and Westchester. The
14 Northern and the Western Districts are upstate. The Eastern
15 District of New York, where we are, is once again, Brooklyn,
16 Queens, Richmond, Suffolk and Nassau.

17 Okay. Now, so it does not include the borough of
18 Manhattan or any location outside the Eastern District of New
19 York. So you must agree which act or acts, if any, established
20 venue.

21 Sorry. Unlike the elements of the offense, the
22 government need only prove venue by the preponderance of the
23 evidence, which is less than proof beyond a reasonable doubt.

24 To establish something by a preponderance of the
25 evidence means to prove that something is more likely so than

1 not. A preponderance of the evidence means the greater weight
2 of the evidence, that does not mean the greater number of
3 witnesses or the greater length of the time taken by either
4 side. This determination is based on the quality and
5 persuasiveness of the evidence, and the weight and effect it
6 has on your minds.

7 If the evidence in this case produces in your mind a
8 belief that it is more likely true than not true, that an act
9 in furtherance of the securities fraud charge you're
10 considering occurred within the Eastern District of New York,
11 if the government has established venue with respect to that
12 charge.

13 If on the other hand you find that it is more likely
14 than not that an act in furtherance of the securities fraud
15 charge you are considering occurred within the Eastern District
16 of New York or the evidence weighs so evenly -- I'm sorry. I
17 think there's a mistake here.

18 Did not occur within the Eastern District of New York
19 or the evidence weighs so evenly that you are unable to say
20 that there is a preponderance of the evidence on either side,
21 then the government has not established venue and you must
22 return a verdict of not guilty on that charge.

23 Now, I'm going make a little note here that I should
24 have had a "not" here.

25 So let me explain to you once again, what is venue all

1 about? It's basically if you were determine whether the
2 government has established by this lesser standard of proof,
3 the preponderance of the evidence that I just explained to you,
4 whether there was any act in furtherance of the crimes charged
5 in the Counts Two and Three occurred within the Eastern
6 District of New York. That's any act in furtherance of any of
7 the crimes. All right? I explained that to you.

8 Now, we're going to go onto Charges 5 and 6, which are
9 the wire fraud charges. Just bear with me while I make a note
10 here that I may have to make a correction.

11 Try as I do to have this thing absolutely correct,
12 when I go through this, sometimes I notice a mistake or so, and
13 then I make the revision before I give you the actual charge.
14 Okay?

15 Now, the indictment charges both defendants with two
16 counts of wire fraud, which both read as follows: "In or about
17 and between March 2007 and June 2007" -- that's that same
18 period, March, April, May, June -- "both dates being
19 approximate and inclusive, the defendants, Ralph Cioffi and
20 Matthew Tannin, did knowingly and intentionally devise a scheme
21 and artifice to defraud the funds investors and to obtain money
22 from them by means of materially false and fraudulent
23 pretenses, representations and promises, and that for the
24 purpose of executing the scheme and artifice, and attempting to
25 do so, the defendants, Ralph Cioffi and Matthew Tannin,

1 transmitted and caused to be transmitted by means of wire
2 communications in interstate and foreign commerce writings,
3 signs, signals, pictures and sounds."

4 Now, the indictment then sets forth an approximate
5 date and time and a description for each count. And I have
6 given you a little chart there, so you will be able to see.

7 So count 5 deals with date of March 15th of 2007, at
8 6:49 a. m., the description of the alleged wire fraud is an
9 email from Tannin to investor Jennifer Wu of Palomar Capital,
10 quote, I am adding money to fund. If you guys are in a
11 position to do so, do the same. I think this is a good
12 opportunity, end quote. Now, that's Count 5.

13 The other wire fraud count is Count 6, two wire fraud
14 counts. And six relates to the date of March 18, 2007, at
15 10:22 p.m. It's an email from Mr. Tannin to investor Benjamin
16 Schliemann of Accumulus Capital, stating that, quote, Ralph and
17 I each have about the 40 percent of our nonreal estate net
18 worth in the fund. I am adding more this month, end quote.

19 To prove wire fraud, the government must prove each of
20 the following elements beyond a reasonable doubt. First, that
21 there was a scheme or artifice to defraud, or to obtain money
22 or property by materially false and fraudulent purposes,
23 representations or promises, as alleged in the indictment.

24 Secondly, that the defendant knowingly and willfully
25 participated in the scheme or artifice to defraud, with

1 knowledge of its fraudulent nature, and with the specific
2 intent to defraud.

3 Third, that in the execution of that scheme, the
4 defendant used or caused the use of interstate or international
5 wires, as specified in the indictment.

6 Now, the first and second elements of wire fraud are
7 equivalent to the first and second elements of security fraud,
8 with two important exceptions. So in all other respects, you
9 are to apply my instructions in those elements. I explained to
10 you what knowledge was, what intent to defraud was, and you
11 will refer back, rather than to repeat it all again would just
12 add another couple of pages. If you go back to how I charged
13 you with respect to the first and second elements of security
14 frauds, and you'll apply that to wire fraud charge as well, in
15 all respects, with two exceptions, which are I'm going to
16 explain.

17 The first exception is that unlike security fraud,
18 which I told you requires the government to prove that the
19 fraud was in connection with a securities transaction, wire
20 fraud requires the government to prove that the fraud at issue
21 involved a plan or scheme to deprive another of money or
22 property by trick, deceit deception or swindle.

23 Second, your consideration of the securities fraud
24 count is not limited to any particular false statement or
25 misleading omission, although as I told you, to convict, you

1 must be unanimous that the defendant you are considering made
2 or caused to be made at least one particular statement or
3 omission.

4 For the wire fraud counts, however, your consideration
5 is limited to the statements charged in the indictment. That
6 is the March 15, 2007 email to Ms. Wu with respect to Count 5,
7 and the March 18th, 2007 email to Mr. Schliemann with respect
8 to Count 6.

9 If you find that the government has proved the first
10 and second elements of the wire fraud, that is, that the
11 defendant you're considering knowingly and willfully
12 participated in the scheme to obtain money or property from
13 others by materially false and fraudulent pretenses,
14 representations or promises with a specific intent to defraud,
15 then you must consider them whether the government has proved
16 the third element, which I will now explain to you, and that
17 means the use of the wires.

18 Okay. Just let me take a another sip of water because
19 I really can use it.

20 Is there any water I could use?

21 MS. JAROSLAW: Yes.

22 THE COURT: I don't want you to think that I am
23 currying favor from the government because I used Ms.
24 Jaroslaw's kindness.

25 I may need your services again shortly.

1 All right. What constitutes the use of the wires?

2 The third and final element of the government must establish
3 beyond a reasonable doubt is the use of interstate or
4 international wire communication in furtherance of the scheme
5 to defraud. The use of a landline telephone or a cell phone or
6 fax machine or the transmission of electronic data, including
7 email, via radio, television or the internet all involve wire
8 communications. To satisfy this element, however, the
9 government must prove that the wire communications passed
10 beyond two or more states or between the United States and a
11 foreign country.

12 The wire communication at issue does not itself carry
13 fraudulent representation. It must, however, further or assist
14 in the carrying out of the scheme to defraud. It is not
15 necessary for the defendant to be directly and personally
16 involved in the wire communication, as long as the
17 communication was reasonably foreseeable in the execution of
18 the alleged scheme to defraud, in which the defendant is
19 accused of participating.

20 In this regard, it is sufficient to establish this
21 element if the evidence justifies a finding that the defendant
22 caused the wires to be used by others. This does not mean that
23 the defendant must specifically have authorized others to make
24 or cause the wires to be sent. When one does an act with the
25 knowledge that the use of the wires will follow in the ordinary

1 course of business, or such a use of the wires could reasonably
2 be foreseen, even though not actually intended, then he causes
3 the wires to be used.

4 With respect to the use of a wires, the government
5 must prove the particular use charged in the indictment.
6 However, the government does not have to prove that the wires
7 were used on the exact date charged in the indictment. It is
8 sufficient that the evidence proves that the wires were used on
9 a date essentially similar to the dates charged in the
10 indictment.

11 All right. Some of these I read real quick. They're
12 all important but, you know, sometimes it logically flows.
13 Some of these things, I may read a little quicker to you.

14 Now, let me talk to you about aiding and abetting.
15 There is another method known as aiding and abetting liability,
16 Aiding and abetting liability, by which you may find someone
17 guilty of securities fraud or wire fraud, even if you do not
18 find that the government has proved beyond a reasonable doubt
19 that the defendant you are considering personally committed
20 securities fraud or wire fraud.

21 You are to consider this alternate theory of liability
22 in reaching your verdict, with respect to Counts Two and Three,
23 securities fraud, and Count Five and Six, the wire fraud.

24 Now Section 2(a) of Title 18 of the United States
25 Code -- the United States Code refers to the books where all

1 the crimes that Congress has established are, you know, set
2 forth -- that reads as follows: "Whoever commits an offense
3 against the United States or aids or abets or counsels,
4 commands or induces or procures its commission is punishable as
5 a principal."

6 In other words, a person who aids or abets another in
7 committing a crime is just as guilty of the crime as if he
8 committed it himself. Accordingly, you must find the defendant
9 you are considering guilty of a particular count, if you find
10 that the government has proved two elements beyond a reasonable
11 doubt with respect to that count. First, that another person
12 actually committed the crime charged; and second, that the
13 defendant aided and abetted that person in the commission of
14 that crime.

15 As you can see, the first requirement is that you find
16 that another person has committed the crime charged.
17 Obviously, no one can be convicted of aiding and abetting the
18 criminal act of another if no crime is committed by the other
19 person in the first place.

20 If you do not find that the crime charge was committed
21 by another, then you must consider whether the defendant aided
22 and abetted the commission of that crime.

23 In order to aid and abet another to commit a crime, it
24 is necessary that the defendant willfully and knowingly
25 associates himself in some way with the crime, and that he

1 willfully and knowingly seeks by some act to help make the
2 crime succeed.

3 Participation in the crime is willful if the action is
4 taken voluntarily and intentionally, or in the case of a
5 failure to act with the specific intent to fail to do something
6 the law requires to be done, that is to say with a bad purpose,
7 either to disobey or to disregard the law.

8 The mere presence of a defendant where the crime is
9 being committed, even coupled with knowledge by a defendant
10 that the crime is being committed or the mere acquiescence of a
11 defendant in the criminal conduct of others, even with guilty
12 knowledge is not sufficient to establish aiding and abetting.
13 The defendant must have performed some act that directly
14 facilitated or encouraged the crime.

15 To determine whether the defendant you're considering
16 aided and abetted the commission of the crimes charged in
17 Counts Two and Three or the crimes charged in Counts Five and
18 Six, ask yourself these questions: One, did he participate in
19 the crime charged as something he wished to bring about? Two,
20 did he associate himself with the criminal venture knowingly
21 and willfully? Three, did he seek by his actions to make the
22 criminal action succeed?

23 If he did all of these things, the defendant is an
24 aider and abettor under this theory, and therefore guilty of
25 the offense. If on the other hand, your answer to any of these

1 questions is no, then the defendant is not an aider or
2 abettor, and you must find him not guilty on that theory.

3 All right. We've gone a long way. And we have about
4 three-quarters of the charge completed now. So, you know, if
5 you want to stand and stretch a little bit, if you feel like
6 you want to take a little break -- I want to give you the
7 entire charge before we break for lunch -- by all means, if you
8 feel like you want to stretch now --

9 Just imagine if you were on the jury when I had to
10 deliver an eight-hour charge. There is a lot here to absorb.
11 I understand that. I realize that when I go through this. You
12 might get lost in the stars, but you are going to have it all
13 in front of you, when you're going to -- all the time that you
14 need to reflect upon it, to give proper deliberation and sort
15 it all out. Okay?

16 Now, I am going to go back to Count One, which is
17 conspiracy to commit securities fraud and wire fraud. And it
18 will be perfectly obvious to you why I changed the order of
19 things, though in the indictment, the conspiracy count is the
20 first count. Since it relates to the Counts Two and Three and
21 Five and Six, I want to give you a sense as to what those
22 counts are before I explain to you what it will be to conspire
23 to commit those crimes. Okay?

24 So I have to read to you the indictment. I will read
25 it to you fast a little bit because I go through each of it

1 very slowly. But let me get through the summary of the
2 indictment charged against the defendants with respect to the
3 conspiracy to commit securities fraud and wire fraud. Here's
4 how it reads: "In or about and between March 2007 and June
5 2007" -- those we have fixed by now -- both dates being
6 approximate and inclusive, within the Eastern District of New
7 York and elsewhere" -- we know where the Eastern District of
8 New York is now, right? "The defendants Ralph Cioffi and
9 Matthew Tannin did knowingly and willfully conspire to do the
10 following: A, use and employ manipulative and deceptive
11 devices and contrivances by employing devices, schemes, and
12 artifices to defraud, making untrue statements of material fact
13 and omitting to state material facts necessary in order to make
14 the statements made, in light of the circumstances in which
15 they were made, not misleading; and C, engaging in acts,
16 practices and course of business which would and did operate as
17 a fraud and deceit upon members of the investing public in
18 connection with the purchase and sales of shares of the High
19 Grade and Enhanced Leverage Funds, directly and indirectly, by
20 use of a means and instrumentalities of interstate commerce,
21 and the mails."

22 So, you have heard that language before. So you can
23 get a sense now what the conspiracy relates to. It is
24 conspiring to commit these acts, which is a separate crime, and
25 I'm going explain that to you.

1 The second part of the conspiracy charge says, B --
2 here's what he also conspired to do -- "knowingly and
3 intentionally devised a scheme and artifice to defraud the
4 Funds' investors and to obtain money from them by means of
5 materially false and fraudulent purposes -- pretenses,
6 representations and promises and for the purpose of executing
7 the scheme and artifice and attempting to do so, to transmit
8 and cause to be transmitted by means of wire communication in
9 interstate and foreign commerce writings, signs, signals,
10 pictures and sounds."

11 You heard that before. In other words, the conspiracy
12 charged is simply that they conspired to commit those
13 substantive crimes.

14 All right. So now I'm first going to instruct you on
15 the general law of conspiracy, then I'll explain how you are to
16 apply it to this case.

17 Now, a conspiracy is a kind of a criminal partnership,
18 at the heart of which is an agreement or understanding by two
19 or more persons to violate other laws. A conspiracy to commit
20 a crime is an entirely separate and different offense than the
21 underlying crime that conspirators intended to commit.

22 You can conspire, but not commit the crime or you have
23 can actually commit the crime, but there's no conspiracy to
24 commit the crime. Okay? Thus, to prove the crime of
25 conspiracy, the government need not prove that the defendant

1 actually committed the unlawful acts charged as the objectives
2 of the conspiracy. In other words, the government need not
3 prove that anyone succeeded in committing securities fraud or
4 wire fraud.

5 Since the heart of the crime of conspiracy is an
6 agreement or understanding by two or more persons to violate
7 other laws, if a conspiracy exists, even if it should fail to
8 achieve its purpose it is still a punishable as a crime.
9 That's the gist of it.

10 In order to prove the crime of conspiracy, the
11 government must establish the following three elements of the
12 crime beyond a reasonable doubt, each one.

13 First, that the Mr. Cioffi and Mr. Tannin entered into
14 the particular unlawful agreement charged in Count One.
15 Second, that the defendant you are considering knowingly and
16 intentionally became a member of this conspiracy. And third,
17 that at least one overt act was committed by at least one of
18 these conspirators. Now, I'm going to discuss each of these in
19 detail now.

20 Let's talk about the first element. What constitutes
21 the existence of a conspiratorial agreement? The government
22 must prove beyond a reasonable doubt that Mr. Cioffi and Mr.
23 Tannin entered into the particular unlawful agreement charged
24 in the conspiracy count. One cannot commit the crime of
25 conspiracy by one's self. Rather, the proof must convince you

1 that Mr. Cioffi and Mr. Tannin joined together in a common
2 criminal scheme.

3 Now, the government need not prove that members of the
4 conspiracy met together or entered into any express or formal
5 agreement. You need not find that the alleged conspirators
6 stated in words or writing what the scheme was, its objective
7 or purpose or the means by which the it was going to be
8 accomplished. It's sufficient to show that the conspirators
9 tacitly came to a mutual understanding to accomplish an
10 unlawful act by means of a join plan or common design. I
11 caution you, however, that the government does not meet its
12 burden of showing an unlawful agreement simply by demonstrating
13 that the underlying criminal act took place.

14 You may, of course, find that the existence of an
15 agreement to engage in criminal conduct has been established by
16 direct proof. However, since a conspiracy is, by its very
17 nature, characterized by secrecy, direct prove may not be
18 available.

19 You may therefore infer the existence of a conspiracy
20 from the circumstances of this case, and the conduct of the
21 parties involved.

22 In a very real sense, then, in the context of
23 conspiracy cases, actions often speak louder than words. You
24 may, in determining whether an agreement existed here, consider
25 the actions and statements of Mr. Cioffi and Mr. Tannin as

1 proof that a common design existed to act together for the
2 accomplishment of the unlawful purpose stated in the agreement.

3 Now, the second element means that you may have to be
4 members of a conspiracy. So before the defendant can be found
5 to have been a conspirator, you must find that he knowingly and
6 deliberately joined in and participated in the unlawful
7 agreement or plan with the specific intent to advance or
8 further some unlawful objective or purpose of the conspiracy.
9 Thus, if a person with an understanding of the unlawful
10 character of the plan knowingly and intentionally encourages,
11 advises or assists for the purpose of furthering the unlawful
12 undertaking or scheme, he thereby becomes a conspirator.
13 Furthermore, one who willfully joins an existing conspiracy is
14 charge with the same responsibility as if he has been one of
15 the originators or instigators of the conspiracy.

16 I further instruct you that to become a member of the
17 conspiracy, a defendant need not have been fully informed of
18 all of the details or the scope of the conspiracy in order to
19 justify an inference of knowledge on his part. Furthermore,
20 the defendant need not have joined in all of the conspiracy's
21 unlawful objectives or have been a member of the conspiracy for
22 the entire time of its existence. There need only be some
23 evidence from which it can reasonably be inferred that the
24 defendant knew of the scheme and knowingly joined and
25 participated in it. The evidence must be viewed as a whole.

1 I want to stress that merely being present when
2 criminal conduct is underway does not make a person a member of
3 the conspiracy to commit that crime. This is true even if the
4 person knows that a crime is being committed.

5 However, although mere presence or mere association
6 with conspirators is not enough, it is a factor that you may
7 consider, among others, in determining whether a defendant was
8 a member of the conspiracy.

9 If the defendant was present and intended to assist in
10 the commission of the offense, then this would not be mere
11 presence. Thus, the defendant's presence may establish his
12 membership in the conspiracy, if all the circumstances,
13 considered together, show that his presence was intended to
14 advance the goals of the conspiracy.

15 Similarly, the fact that a person, without any
16 knowledge that a crime is being committed, merely happens to
17 act in a way that furthers the purposes or objectives of the
18 conspiracy does not make that person a member. More is
19 required under the law. Even giving comfort or assistance to a
20 member of a conspiracy does not make a person a member of a
21 conspiracy. What is required, once again, is that the
22 defendant has participated with knowledge of at least some of
23 the purposes or objectives of the conspiracy, and with the
24 intention of aiding in the accomplishment of those unlawful
25 ends.

1 The extent of a defendant's participation in a
2 conspiracy has no bearing on the issue of guilt. Each member
3 of a conspiracy may perform separate and distinct acts and may
4 perform them at different times. Some conspirators may play
5 major roles, while others may play minor roles in the scheme.

6 In sum, the key inquiry is simply whether the
7 defendant joined the conspiracy with awareness of at least some
8 of the basic aims and purposes of the unlawful agreement and
9 with the intent to help it succeed.

10 Now, as I told you, the last element is an overt act.
11 As I told you, the third element that the government must prove
12 beyond a reasonable doubt is that at least one overt act was
13 knowingly committed or caused to be committed by at least one
14 of the conspirators, at or about the time and place alleged,
15 and that the act was in furtherance of some object or purpose
16 of the conspiracy.

17 So if you find that there was an agreement between Mr.
18 Tannin and Mr. Cioffi, and that the defendants you are
19 considering joined the conspiracy, then you have to also
20 consider whether one of these overt acts was committed in
21 furtherance of the conspiracy.

22 And here's what the alleged overt acts are. There are
23 six.

24 One, on March 7, 2007, Mr. Cioffi told Shelley Bergman
25 that the funds presented an "awesome opportunity." Two, on or

1 about March 21, 2007, Tannin told George Buxton that he was
2 adding money to his personal investment in the Enhanced
3 Leverage Fund. Three, on April 25, 2007, Cioffi participated
4 in an investor conference call, during which he made material
5 misrepresentations and omitted material facts. Four, on
6 April 25, 2007, Tannin participated in an investor conference
7 call, during which he made material misrepresentations and
8 omitted material facts. Five, on May 3, 2007, Tannin told John
9 Bowden of Dresdner Capital that he anticipated no large
10 redemptions. Six, in or about mid-May 2007, Cioffi told
11 Shelley Bergman and Jason Bunin that he had 5.5 million
12 personally invested in the funds.

13 The government is not required to prove all of the
14 alleged overt acts. Similarly, you need not find that each of
15 the defendants committed overt acts. In order for the
16 government to satisfy its burden on this element, it must prove
17 beyond a reasonable doubt that at least one overt act was
18 knowingly and willfully committed by at least one coconspirator
19 in furtherance of some object or purpose of the conspiracy.

20 In this regard, you should bear in mind that an overt
21 act, standing alone, may be an innocent, lawful act.
22 Frequently, however, an apparently innocent act sheds its
23 harmless character if it is a step in carrying out, promoting,
24 aiding or assisting the conspiratorial scheme. You are
25 therefore instructed that the overt act does not have to be an

1 act which, in and of itself is criminal, or constitutes an
2 objective of the conspiracy. What is necessary is that it be a
3 step that furthers or carries out or promotes a conspiratorial
4 scheme.

5 Ms. Jaroslaw, once again.

6 MS. JAROSLAW: Again, Your Honor.

7 THE COURT: Now, I came down with a bug over the
8 weekend. I can see it's sort of dehydrated me over the
9 weekend. I apologize for this.

10 Now, the objectives of the conspiracy, it is not
11 sufficient for the government to prove that the defendants
12 entered into a conspiracy to commit some unspecified crime.
13 Rather, the government must prove the conspiracy had a
14 particular unlawful objective.

15 This is why I explained first, you know, what
16 securities fraud constitutes, and what wire fraud is about.

17 So the conspiracy charge in Count One alleges that the
18 defendants conspired to commit securities fraud, that is, the
19 crimes charged in Counts Two and Three, and wire fraud, that
20 is, the crimes charged in Counts Five and Six.

21 Thus, the government alleges that the conspiracy had
22 two unlawful objectives, namely, securities fraud and wire
23 fraud. The government does not have to prove that the
24 defendants agreed on both objectives. Where a conspiracy has
25 more than one objective, the government need only prove that

1 the conspirators agreed to accomplish at least one of the
2 objectives and committed at least one overt act in respect to
3 that objective.

4 So you know what the objectives were, that we told you
5 about. Doesn't mean they committed them. Those objectives
6 were involved here, but the objectives, you understand,
7 security fraud, Counts Two and Three, wire fraud is Counts Five
8 and Six. Those are the objectives I mentioned of the
9 conspiracy, that the defendants conspired to commit the crimes.

10 Thus, in order for you to find the defendants guilty
11 of Count One, you must find that they conspired with one
12 another to carry out at least one of the crimes charged in the
13 two securities fraud counts, and the two wire fraud counts, and
14 that at least one of the charged overt acts was committed with
15 respect to that particular objective. You must be unanimous as
16 to the particular objective or objectives agreed to, and the
17 particular overt act or acts committed with respect to a
18 particular objective. So you all have to be on the same page
19 as to the particular overt act and the particular objective
20 that was committed in respect to that.

21 All right. Now that I have explained the law of
22 conspiracy, I must instruct you on another theory of liability
23 on Counts 2 and Three, and Counts 5 and 6. Even if you do not
24 find the government has satisfied its burden of proofing that
25 the defendant you are considering is guilty on those charges,

1 as either a principal or an aider and abettor -- I explained to
2 you what a principal is, in aiding and abetting -- there is
3 another method by which you may evaluate the defendants'
4 possible guilt on those charges.

5 If you find beyond a reasonable doubt that the
6 defendant you are considering was a member of the conspiracy
7 charged in Count One, then you may also but are not required to
8 find him guilty the substantive crimes charged in Counts Two
9 and Three and Counts Five and Six, provided you find beyond a
10 reasonable doubt each of the following elements: First, that
11 the substantive crime charged in the count that you are
12 considering was committed by the other defendant; second, that
13 the other defendant was also a member of the conspiracy charged
14 in Count One; third, that the substantive crime charged in the
15 count you are considering was committed pursuant to a common
16 plan and understanding you found to exist among the
17 conspirators; fourth, that the defendant who you are
18 considering was a member of the conspiracy at the time the
19 substantive crime was committed; and five, that the defendant
20 you are considering could reasonably have foreseen that the
21 substantive crime might be committed by the other defendant in
22 furtherance of the conspiracy.

23 So that requires you to find that the defendant you
24 are considering could reasonably have foreseen that the
25 substantive crime might be committed by the other defendant in

1 furtherance of the conspiracy.

2 Now, if the government has proven of five of these
3 elements beyond a reasonable doubt with respect to one or more
4 of the crimes charged in Counts Two and Three and Counts Five
5 and Six, then you may the defendant you are considering guilty
6 of those crimes, even if he did not have actual knowledge of or
7 participate in the acts constituting the crime.

8 This reason for this rule is simply that a
9 coconspirator who commits a substantive crime pursuant to a
10 conspiracy is deemed to be the agent of the other
11 coconspirator. Therefore, all coconspirators must bear
12 criminal responsibility for the crimes reasonably committed in
13 furtherance of -- not reasonably, the crimes foreseeably
14 committed in furtherance of the conspiracy.

15 If, however, you are not satisfied as to the existence
16 of any of these five elements, then you may not find the
17 defendant guilty of the crime charged in the count you are
18 considering.

19 Now, once again, let's talk about venue. As with the
20 substantive securities fraud counts, the government must
21 establish venue with respect to the conspiracy count. And this
22 means that government must prove by a preponderance of the
23 evidence either that the unlawful agreement was formed or that
24 at least one overt act was committed in the Eastern District of
25 New York -- and that is the boroughs of Queens, Brooklyn,

1 Staten Island, and the counties of Suffolk and Nassau. You
2 have to find venue with respect to the substantive securities
3 fraud counts and the wire fraud count, as I explained to you.

4 All right. Now, once again, the standard for venue,
5 as I explained to you is the preponderance of the evidence.
6 The overt act supporting venue need not be one of the six
7 listed in Count One, but it must be some act taken in
8 furtherance of the charged conspiracy. This would include not
9 just acts by Mr. Cioffi or Mr. Tannin, but also acts that they
10 caused others to take that materially furthered the ends of the
11 conspiracy. You must all agree as to which act or acts, if
12 any, establish venue.

13 If you find that the government has not established
14 venue, then you must return a verdict of not guilty to both
15 defendants as to the conspiracy counts.

16 Okay. I have to tell you that I am up to the last
17 count, which is the insider trading count, which only applies
18 to Mr. Cioffi. One more glass of water.

19 Here's what it says. Count four -- so that I skipped
20 over four, because I wanted to explain to you all the counts
21 that applied to both defendants first, then isolate the one
22 count that applies only to Mr. Cioffi, which is Count Four.

23 "On or about or between March 23, 2007 and April 1,
24 2007, the defendant, Ralph Cioffi, did knowingly and willfully
25 use and employ manipulative and deceptive devices and

1 contrivances, in that the defendant did knowingly and willfully
2 A, employ devices, schemes and artifices to defraud; B, make
3 untrue statements of material fact, and omit to state material
4 facts necessary in order to make the statements made, in light
5 of the circumstances in which they were made, not misleading;
6 and C, engaged in acts, practices and courses of business which
7 would and did operate as a fraud and deceit upon members of the
8 investing public, in connection with the purchases and sales of
9 shares of the Enhanced Leverage Fund, directly and indirectly,
10 by the use of the means and instrumentalities of interstate
11 commerce and the mails, in that the defendant sold shares he
12 owned in the Enhanced Leverage Fund while in possession of
13 material nonpublic information regarding the Fund's liquidity,
14 the Fund's redemptions and the Fund's prospects."

15 So you can see that much of this, you know, repeats
16 the same language that we spoke about when we talked about
17 security fraud. And what makes the insider trading count
18 different is that it adds onto it that all of this had to be in
19 respect to the defendant selling shares he owned in the
20 Enhanced Leverage Fund, while in possession of material
21 nonpublic information regarding the Fund's liquidity, the
22 Fund's redemption and the Fund's prospects.

23 Let me go through all the elements first. That at any
24 time between March 2007 and June of 2007, in connection with
25 the purchase of sale of shares in the Enhanced Leverage Fund,

1 Mr. Cioffi employed a device, scheme or artifice to defraud;
2 second, that he acted willfully, knowingly, with the intent to
3 defraud; and third, that he knowingly used or caused to be used
4 A, any means of instruments of transportation or communication
5 in interstate commerce, B, the mails; C, any facility of any
6 national securities exchange, in furtherance of the scheme.

7 As you can see, the elements of insider trading are
8 very similar to the elements of the securities fraud, that is,
9 because insider trading is a specific kind of illegal device,
10 scheme or artifice under the Federal Securities Laws. Those
11 laws prohibit insider trading, based on the basic unfairness of
12 allowing those with access to material, nonpublic information
13 intended to be used only for a common or shared purpose, to
14 benefit personally from the use of such information.

15 You know, I just realized that the indictment here
16 talks about the days between March 23 and April 1st. So you
17 know, I'm going just make this edit here by putting those dates
18 in here when I talk about the elements as well, so it tracks
19 the -- well, I'm going to have to just reflect upon that. Just
20 the indictment does talk about between March 23, 2007 and April
21 1st, 2007. So we're going to have to reflect on that. Let me
22 just make a note here.

23 All right. So the first element, insider trading.
24 The first element that the government must prove beyond a
25 reasonable doubt is that Mr. Cioffi engaged in insider trading.

1 An insider is a person who comes into possession of material
2 confidential nonpublic information about a security by virtue
3 of a relationship that involves trust and confidence. When a
4 person has such insider information, he must either disclose it
5 or refrain from trading. If his position of trust or
6 confidence prevents him from disclosing the information, the
7 law forbids him from buying or selling the security in
8 question.

9 The securities laws do not prohibit all trading based
10 on nonpublic information. A person who will be forbidden to
11 buy or sell a particular security only if he has assumed a
12 special confidential relationship that affords him access to
13 confidential information that is intended to be available only
14 for a common or business purpose -- in this case, for the
15 purposes of the Enhanced Leverage Fund, and not for his
16 personal benefit. Thus, it is the confidential nature of the
17 relationship which determines whether a person is an insider
18 and not merely the title he holds.

19 In considering this element, you must also determine
20 whether the confidential information in question is material.
21 As I told you in connection with the Counts Two and Three,
22 material information is information that would have been
23 significant to a reasonable investor in the Enhanced Leverage
24 Fund in making an investment decision about the Fund.

25 Thus, for the government to establish that Mr. Cioffi

1 engaged in illegal insider trading, it must prove beyond a
2 reasonable doubt that he had access to material nonpublic
3 information by virtue of his position as portfolio manager of
4 the Enhanced Leverage Fund. The nature of his position imposed
5 a relationship of trust and confidence with the Enhanced
6 Leverage Fund investors such that the material nonpublic
7 information he acquired about the Enhanced Leverage Fund was
8 intended to be used only to carry out his duties as manager of
9 the Enhanced Leverage Fund, and not for his personal benefit as
10 an investor in the Enhanced Leverage Fund.

11 In this regard, I instruct you that the mere working
12 relationship is not sufficient to impose insider status on the
13 defendant. Once again, in order for the defendant to be an
14 insider, the nature of the relationship must be one of trust
15 and confidence.

16 In the law, a relationship of trust and confidence is
17 known as a fiduciary relationship. At the heart of a fiduciary
18 relationship lies reliance and de facto control and dominance.
19 Such a relationship arises where one party has the power and
20 opportunity to take advantage of the other because of the
21 other's susceptibility or vulnerability. In order for such a
22 relationship to exist, a fiduciary must have discretionary
23 authority and the other party must depend on the fiduciary to
24 serve his interest.

25 To repeat, the mere possession of material nonpublic

1 information does not impose any duty on an individual to
2 disclose before trading or refrain from trading. You must find
3 that there existed some special relationship, as I have just
4 explained, that created such a duty. It is the breach of that
5 duty that provides the basis for the government's allegation
6 that Mr. Cioffi engaged in insider trading.

7 Now, the second and third element of insider trading
8 are identical to the second and third elements of securities
9 fraud, and I refer you to my instruction on those elements.

10 By way of reminder, with respect to the second
11 element, the government must prove beyond a reasonable doubt
12 that Mr. Cioffi acted knowingly, willfully and with intent to
13 defraud, as I previously defined those terms for you. With
14 rest to the third element, the government must prove beyond a
15 reasonable doubt that Mr. Cioffi knowingly used or caused to be
16 used the mails or instrumentalities of interstate commerce,
17 such as a telephone, fax machine, email or private delivery
18 service, or any facility of a national securities exchange to
19 carry out the alleged insider trading.

20 So let me pause. When I crafted this charge, I had
21 the choice to once again repeat to you my explanations of
22 knowingly, willfully, intent to defraud. When I said about
23 good faith and all those other instructions I gave you when I
24 first explained all of those to you. That would add another
25 couple of pages and I think, you know, it would be a burden, an

1 unnecessary burden to a wise group of folks to have to do that.
2 I think it's sufficient that I refer you back to the definition
3 I first gave when I explained to you what knowingly and
4 willfully and intent to defraud and good faith, all of those
5 instructions, rather than to have to spend another five or ten
6 minuting repeating them all to you. The fact that I did the
7 shortcut doesn't mean it's less important. You have to really,
8 you know, think about it in the context of the underlying
9 charge, which I gave you when I first talked to you about
10 knowingly and willfully and with intent today fraud. So be
11 mindful of that.

12 You will happy to hear that I am up to the concluding
13 remarks.

14 Before I start, I want to let you know that, you know,
15 we have state courts. We have federal courts. We have state
16 laws and rules that govern a trial in a state court. And we
17 have rules that govern trials in federal court.

18 If I recall correctly, I think it's still the case
19 that if this were a state Court, the judge would not be allowed
20 to give you an aid, a copy of the charge. You can come back
21 and ask for the charge to be repeated or explained. You can
22 still do that here. But I think you're probably happy that
23 you're sitting in the federal court here, looking at your
24 faces.

25 So that concludes my instructions on the elements of

1 the crimes charged. Before I ask you to retire to the jury
2 room to begin your deliberations, there are a few additional
3 matters that I would like to speak to you about.

4 You will be happy to know that Mr. Innelli, I'm sure,
5 has provided food for you. The first thing you can do after I
6 send you on your way is to eat. Take a break, relax a little
7 bit. All right?

8 But the question of punishment is of no concern to
9 you. It should not in any sense enter into or influence your
10 deliberations. It's another curiosity people speculate about.
11 It's not for you to consider, whatsoever.

12 That is because the duty for imposing sentence, if
13 there be a conviction, rests exclusively with me. Your
14 function is to weigh the evidence in the case and to determine
15 whether or not the defendant you are considering is guilty,
16 solely upon the basis of the evidence.

17 Under your oath as jurors, you cannot allow a
18 consideration of the punishment which may be imposed upon the
19 defendant, if convicted to influence your verdict in anyway or
20 enter in any sense into your deliberations now.

21 Now, I mentioned Ms. McCoughey.

22 JUROR: McCoughey.

23 THE COURT: Is sitting in seat number one. You are
24 going to select a foreperson. And let me tell you what you
25 should do. The fact that you're sitting in seat number one

1 doesn't mean you have to be the foreperson. Doesn't mean you
2 can't be the foreperson. It's just the way you are seated.
3 So, I think probably first thing you may want to do is consider
4 who that person ought to be.

5 Think about this. You know, that person would have to
6 stand at the end while the rest of you are probably seated and
7 deliver the verdict. Some people may not be comfortable with
8 doing that. You have to select somebody who will feel okay
9 about doing that.

10 The foreperson is the person who is going to be your
11 liaison to me. It's going to be the person who is going to be
12 your communication means.

13 What does that mean? If any of you have a question
14 that you want, you know, to be present to me to clarify
15 anything, or you want to testimony to be recalled, either read
16 back to you or give you copies of the testimony, if we can find
17 it quickly enough for you. Then, you have to let me know, you
18 see?

19 So you'll have a nice sheet of, you know, yellow
20 paper, a pad of yellow paper, and a foreperson has to have a
21 nice, legible handwriting, hopefully, the person who is going
22 to write the notes out and send them to the marshal outside the
23 jury deliberating room, who in turn gives them to me.

24 I either then respond by writing on that paper, if I
25 can do so. If it's a short question, I can feel like I can

1 just turn it around like that or call you back here. And I'll
2 answer your question in court. It depends on what you really
3 want to know.

4 And the foreperson has to sign his or her name, and
5 also to date and put the time that any particular note is
6 rendered, because I keep a track of it, all these remarks, as
7 court exhibits. We keep a very careful record, of course, of
8 everything that happens.

9 So, you know, legible handwriting would be greatly
10 appreciated, and somebody who is going to be able to be an
11 effective communicator between you folks and the Court.

12 Now, as I told you, if you want to see the exhibits,
13 they're going to be sent to you, upon your request. And what
14 we have done is that since we have had so many exhibits and so
15 many people who have testified, you're going to have a list of
16 all of the plaintiff's exhibits, and then all the emails and
17 dates and who they're from, including a descriptive label, as
18 well as the evidence. There are many, many exhibits.

19 So rather than to send everything into you, I think
20 that exhibit list will be a very handy way for you to call for
21 any exhibits that you may want to see, and then when you do so,
22 Mr. Innelli will probably get them right into you. Okay?

23 And we also have a list of the witnesses and the dates
24 that they testified. And that should be an aid to you, as
25 well. These are just aids to help you in your deliberations.

1 So if you want any of the testimony read back,
2 depending upon how extensive it is, I can call you back here,
3 and somebody can read the testimony back to you, or I might, in
4 my discretion, we have transcripts, daily transcripts because
5 of the outstanding court reporter services that we have here.
6 And I can send in maybe copies of that.

7 But bear in mind, you know, to be a little bit
8 selective, if you can do so, because whatever you ask for, I
9 have to find it. So it may take some time to do that. And you
10 know, hopefully you are not asking for everything, you know.
11 And so try to be as focused as you possibly can, so that we can
12 turn this around as quickly to you. Focus on what you really
13 want.

14 And while we are getting that information for you,
15 depending upon what you ask, we could take more or less this
16 time out to that amount of time, you can continue with your
17 deliberations or you can stop. You may say that we don't want
18 to go any further until we get this information back, or you
19 may find that you can continue talk about things while we turn
20 your request around and get it back to you. So you are in
21 charge of all of that.

22 And of course, you can come back and ask me to explain
23 anything about the charge. Even though you'll have it as an
24 aid for you here, you may be uncertain about things. You may
25 want further elaboration. Hopefully, we got it all down right.

1 That's what we're supposed to do. Don't be bashful. Don't
2 guess. We're here to serve you. All right?

3 Remember that when you deliberate, you have to all be
4 together. That is the whole beauty why we have 12 tried and
5 true jurors, each listening to each other during deliberations.

6 So if any of you have to use the facilities. I know
7 we have a few smokers here. Then you stop your deliberations
8 until you are all together again.

9 And now, whatever you send to me, any note you send to
10 me, I don't want to know how you stand on any particular count
11 during deliberations, just the information, okay? Keep your
12 deliberations private, to yourself, and keep whatever it is
13 private to yourself. I'm just here to just turn around
14 information for you, to assist you.

15 Now, as far as the duty to consult and the need for
16 unanimity. Here's how we the end the proceeding is by telling
17 that you that the government once again, to prevail, must prove
18 beyond a reasonable doubt each of the elements of the offenses
19 charged. If the government succeeds with respect to a
20 particular count, your verdict should be guilty on that count.
21 And if the government fails with respect to a particular count,
22 your verdict must be not guilty on that count. Once again,
23 each defendant has to be separately evaluated.

24 Now, each of you folks are entitled to your own
25 opinion. However, you should exchange views with your fellow

1 jurors. That is the very purpose of jury deliberation, to
2 discuss and consider the evidence, to listen to the arguments
3 of fellow jurors, to present your individual views, to consult
4 with one another and to reach agreement based solely and wholly
5 on the evidence, if you can do so without violence to your own
6 individual judgment.

7 Each of you must decide the case for yourself, after
8 consideration with your fellow jurors of the evidence in the
9 case. You shall not hesitate to change an opinion which, after
10 discussion with your fellow jurors, appears erroneous. On the
11 other hand, after carefully considering all of the evidence and
12 the arguments of your fellow jurors, you still entertain a
13 conscientious view that differs from the others, you are not to
14 yield your belief simply because you are outnumbered.

15 And your final vote must reflect your conscientious
16 belief as to how the issue should be decided. Your verdict at
17 each count, whether guilty or not guilty, must be unanimous.

18 And I explained to you about unanimity with respect to
19 the venue issues and the overt acts.

20 And your oath sums up your duty. As told you, we
21 begin the trial and we end it by reminding you of the oath.
22 Now, without fear or favor, you will well and truly try the
23 issues between these parties, according to the evidence given
24 to you in court, and the laws of the United States.

25 Now, in addition to each getting a copy of the jury

1 charge -- which once again, is just an aid. So what you're
2 going to have is a table of contents. It doesn't mean I'm
3 suggesting to you, of course, how you are to go about your
4 deliberations. Specifically, just once again, it makes it
5 easier, if you choose to, to find whatever you may want.

6 And the headings I put in here doesn't mean that I'm
7 giving you any -- it's just to help you to as an aid, to guide
8 you along -- the same thing with the verdict sheet, and I don't
9 think you need -- each need a copy of the sheet. It's simply
10 enough.

11 Count One, conspiracy to commit securities fraud, wire
12 fraud -- once again, the fact that I put that label is not an
13 indication of what the verdict should be. They need to be
14 included into what count you're talking about.

15 Just how to you find the defendant, Ralph Cioffi,
16 guilty not guilty. How do you find the defendant, Matthew
17 Tannin, guilty or not guilty?

18 So I put the conspiracy count first, because that's
19 the first one that's in this indictment. But when I explained
20 the law to you, as you realize, I gave you the substantive laws
21 on the other counts first, so you would understand what the
22 objectives of the security would be, you see?

23 Then Count Two is securities fraud. That's the High
24 Grade Fund. And once again, how do you find each defendant?
25 Count 3 is the Enhanced Leverage Fund. How do you find each

1 defendant?

2 Count 4 is the insider trading. That is only as to
3 defendant Ralph Cioffi.

4 Count 5 is the wire fraud. That applies to each
5 defendant. And Count 5 refers to the email of March 15, 2007.

6 And Count 6, the last count, refers to the email of
7 March 18th 2007, with respect to that wire fraud. And that
8 applies to each one.

9 And then when you have completed your deliberations
10 and you have rendered your verdicts which must be unanimous on
11 each count, then the foreperson, whoever you select, will sign
12 this and it be dated.

13 And then you will let the marshal know that you
14 reached a verdict. Send the marshal a note. The marshal will
15 then give that to me. And the foreperson will carry the actual
16 verdict, official verdict in with him or her into the
17 courtroom. And then that person will be asked to rise and
18 after that, ask each juror whether that constitutes their
19 verdict, to make sure it's unanimous among all of you.

20 So I told you it would be an hour and-a-half, and I
21 was a little bit off in my calculations. I think I went a
22 little bit beyond that.

23 It's still a perfect time for you to have lunch. You
24 don't have to discuss the case before, but you can. But if you
25 choose to do so, all of you have to be, once again, together.

1 You may want to just take a little pause and relax a little
2 bit.

3 It's all up to you. It's all up to you to decide how
4 long your deliberations were going to be. You know, obviously,
5 there's a lot to, you know, digest here, and you have been here
6 I guess we're about the fourth week.

7 Nobody is under any pressure. That's terribly
8 important that nobody feel that there is any personal pressures
9 they have. If they have anything at home, either -- they have
10 to understand your juror duties are your responsibility now,
11 your sole responsibility. And you'll take however long it
12 takes to, you know, deal with the all of the issues, to make
13 sure you understand everything, and to go about your
14 deliberations and discharge. You that very special
15 responsibility, you have as a citizen of the United States
16 here.

17 It's been a long trial, as trials go. There are
18 trials that are much longer. But this is probably longer than
19 the average trial. You have been extremely attentive. You
20 know I've complimented you many, many times. I've never had a
21 jury that has been so punctual, quite frankly, in my 15 years
22 as a judge.

23 And I think it's not easy to pay attention, you know,
24 from October 13 to November 9. That happens because you are
25 only human. But we are all here together. We have the full

1 record. We have all the evidence. Everything is in place.
2 And you'll take whatever time you need to render your verdict.

3 As far as the rest of day is concerned, you can
4 stay -- I don't know -- five. We're here to basically turn the
5 courtroom over to you, within reason, but I think you would
6 want to use the whole day. If you want to stay beyond five,
7 you can do that. I've had some jurors who requested, you know,
8 the opportunity to stay late in the evening. We accommodate
9 the jurors.

10 And I know that we'll take each day as it comes, and
11 you know, that is basically I think what I have to tell you.
12 Now, just bear with me, because I'm not going to get the
13 so-called jury charge into you probably for about a half-hour.
14 As I go through it, I see a couple of things that maybe I
15 should, you know, change, nothing that substantive than what I
16 told you. I want to make sure it's perfect as it can be. So
17 that make take a little bit of time.

18 I have to talk to the lawyers first, to give them an
19 opportunity to tell me whether I made any mistakes, and to hear
20 them out. So we'll do that now at sidebar. And I'll be right
21 back to you then.

22 And we're going to swear in the marshal, and you'll be
23 charged with the commencement of the deliberations.

24 (To the alternate jurors) You folks, do you have
25 everything with you? Do you have to go back in the jury room?

1 I want to talk you separately, after your colleagues go off to
2 deliberate. So stay behind. All right?

3 All right. Let me speak to the lawyers.

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1 (Sidebar)

2 THE COURT: All right. Let me first tell you that
3 whatever objections you made during the course of our extensive
4 discussions about the charge and everything else are preserved.
5 So have the Court's representation with respect to that. As
6 you have pointed out, being very conscientious lawyers, you
7 have put this down in writing. I have it. You need not fear
8 that you have to go through everything again right now, at this
9 particular table stage. I was concerned about that I got this
10 right, in terms of the insider trading account. And so I want
11 to chat with you about that because the time refers to specific
12 dates between March 23 and April 1st, yet when I looked at the
13 first element, it did not have those dates within it. So I
14 just sort of made a notation. I think I should refer to those
15 dates. And I think I told the jury that, as well. So, I just
16 wanted to --

17 MR. MCGOVERN: The dates in the indictment are
18 controlling.

19 THE COURT: We have a lot of brilliant people, yet we
20 can still inadvertently look over things.

21 MS. KEELEY: Yes, Your Honor. We agree with you,
22 Judge.

23 THE COURT: Then there are a couple of other little
24 edits -- I'll refer to them as little edits -- which I'll put
25 in here, and some spaces and stuff like that, I don't think I

1 need to go over specifically, but I'll give the jurors the
2 charge. I'll give you the final file, and you know, take a
3 look at it to make sure we're all on board. Okay?

4 How about that speech?

5 Government first. Any exceptions?

6 MR. MCGOVERN: Just the verdict form. I don't know if
7 I had the final final, but it has the wrong index number. Did
8 you catch that?

9 THE COURT: I don't see a wrong number. Good. That's
10 why we're working here.

11 Anything else about that?

12 MR. MCGOVERN: That's all I've got.

13 THE COURT: Who wants to go first?

14 MS. EDELSTEIN: Your Honor, we just stand on our prior
15 objections. We have a written pleading which we'll hand to Mr.
16 Innelli, and to the government.

17 MS. KEELEY: And we'll file that by ECF.

18 THE COURT: Okay.

19 MR. MCGOVERN: Thank you.

20 THE COURT: Anyone else?

21 MS. EDELSTEIN: Nothing else. We have written
22 objections.

23 THE COURT: I assume you can all go off for lunch.

24 MS. BRUNE: I hope so, Judge.

25 THE COURT: Stay in touch with Mr. Innelli. And let's

1 get the things we need. You've got your exhibit list and all.

2 MR. SANO: Just one --

3 THE COURT: Just get it done as quickly as possible.

4 Anything else?

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1 (Sidebar ends.)

2 THE COURT: Maybe I should have given the charge from
3 up there so you wouldn't run a risk of catching my cold. I
4 think you'll be okay on the final.

5 All right. So we've taken care of everything that
6 needs to be taken care. And Mr. Innelli, you do have lunch
7 waiting for these folks?

8 THE CLERK: Yes.

9 THE COURT: Now give the marshal the oath, please.

10 (Marshal sworn.)

11 THE COURT: All right. Mr. Marshal, the jurors are in
12 your good hands. You can commence your deliberations now, and
13 we'll get the charge into you in about a half an hour or so. I
14 roughly expect the witness list and the exhibit list should
15 come in shortly, okay.

16 THE CLERK: All rise.

17 (Jurors exit the courtroom.)

18 THE COURT: I'm surprised that we didn't need an
19 alternate, we came close. But, these were an exceptionally
20 healthy group of jurors who showed up on time, and I thought
21 for sure we would need an alternate or two during the course of
22 the trial. You know, we needed you because I had no way of
23 predicting that. I think it's exceptional we have a four-week
24 trial and we don't need at least one of our alternates. This
25 happens to an exceptional case. I think you realize how

1 important it was that we have you here because if we lost
2 somebody and we didn't have an alternate, you know how much
3 money it would cost the taxpayers to try this case over again?
4 Obviously I want to avoid doing that. And we need to have
5 alternates there.

6 At the same time I've noted that you listened to
7 everything, you came here every day, and maybe somewhat
8 frustrated you're not going to be part of the deliberative
9 process, that's strictly the way it is. You could have easily
10 been a member of the jury, just the way the numbers came out.
11 I want to sincerely thank you for being wonderful citizens, and
12 for, you know, just being terrific because you showed up here
13 just with the rest of them, you paid attention, I saw you
14 taking notes, and you should be commended.

15 Now that your services are over, you're free to leave,
16 and there is no first amendment gag here. You can use your own
17 discretion as to whether or not you want to speak to somebody.
18 It wouldn't surprise me if the press wanted to talk to you, and
19 it's your discretion as to what you wish to do. And you can go
20 to the lawyers, you can even talk to me if you can catch me.
21 There is some cases where their very nature, we're a little
22 more concerned about, you know, being free to talk to anybody.
23 But we're not dealing with anybody's real personal safety here
24 and stuff like that, so I'm not so concerned about that.

25 Having said that, I thank you once again, you're free

1 to leave. Mr. Innelli, if you care of the these good folks,
2 have everything they need.

3 THE CLERK: Yes.

4 THE COURT: Thank you very much.

5 THE CLERK: All rise.

6 (Time noted: 12:55 p. m.)

7 (Recess.)

8 THE COURT: All right.

9 (Time noted: 3:50.)

10 THE CLERK: You may be seated. Let me get -- the
11 government isn't here yet.

12 THE COURT: Who are we waiting for?

13 THE CLERK: He government stepped outside.

14 THE COURT: Everybody here?

15 THE CLERK: Yes.

16 THE COURT: All right. So since we were here last, we
17 have some notes. And I believe Mr. Innelli, we did mark Court
18 Exhibits 1, 2 and 3 as we indicated?

19 THE CLERK: Yes, Your Honor.

20 THE COURT: One is the charge?

21 THE CLERK: Yes.

22 THE COURT: All right. And that was revised and sent
23 into the jury room. And each of you have a copy of that
24 presumably, right?

25 And then Exhibit 2, I take, is the exhibit list or the

1 witness list?

2 THE CLERK: Exhibit 2 is the witness list.

3 THE COURT: The witness list? That was sent into the
4 jurors, Mr. Innelli?

5 THE CLERK: Yes, Your Honor.

6 THE COURT: Exhibit 3 is the collective witness --
7 exhibit list that been sent in also, I understand?

8 THE CLERK: Yes.

9 THE COURT: And now Exhibit 4, which was rendered at
10 2:46 by the foreperson, who is indeed juror number one, if I
11 can pronounce the name correctly, it's Ms. McCoughey? I think
12 that's how she pronounced it.

13 Mr. McGovern, you're an expert in that. Was it
14 McCoughey?

15 MR. MCGOVERN: I believe it's McCoughey, Your Honor.

16 THE COURT: All right. "Please explain venue
17 further."

18 And then what followed after that was at 3:10, we
19 received the following note, which the Court has marked Exhibit
20 5, we would like to see Exhibits 535 -- and Government Exhibit
21 535, Government Exhibit 535-A, Government Exhibit 3500-KH-1.

22 I assume that all of those exhibits have been sent in
23 for the jurors, Mr. Innelli?

24 THE CLERK: Yes, they have.

25 THE COURT: All right, and then at 3:13, we received

1 this last note, marked Court Exhibit 6, we would like to see
2 the testimony of Kathleen Hartmann.

3 Okay. Let's take them in reverse order.

4 THE CLERK: That's been sent in.

5 THE COURT: How many pages do we have of that?

6 THE CLERK: That started on 1819 and ended on 1839.

7 THE COURT: All right. And you have copies of it?

8 THE CLERK: It's already been sent in, two copies.

9 THE COURT: They have been sent in? Two copies each?

10 THE CLERK: Yes.

11 THE COURT: All right. So then let's talk about
12 venue.

13 MR. SINCLAIR: Your Honor, just for the record so the
14 Court is aware, there's a colloquy in between those two pages
15 that Mr. Innelli said at sidebar, which we removed from the
16 transcript, and all counsel agreed with that.

17 THE COURT: Very good. You know when we get these
18 requests, whatever happened in front of the jurors I don't
19 think we have to sanitize. What we say, objections and
20 rulings, I mean, they heard it all. But what was at sidebar
21 could, should be of course.

22 All right. So on venue, government, what do you
23 think -- I'm going to just pick on you Mr. McGovern, don't mean
24 to denigrate the others but I have to just call on one person
25 to be the spoke person, so what's your pleasure with respect to

1 that?

2 MR. MCGOVERN: I think the charge that you had
3 originally given this morning was appropriate, that it was not
4 just the any overt act that's charged in the indictment. Any
5 overt acts that were done by defendants or by anyone else, or
6 any overt acts that were, I think the standard goes as far as
7 anything that would have been reasonably foreseeable that would
8 have occurred in the Eastern District as a result.

9 THE COURT: Let me go back here. When we talked about
10 the conspiracy venue, we did elaborate by saying that venue
11 need not be one of the six overt acts listed in count one but
12 must be some act taken in furtherance of the charge conspiracy,
13 then would add the following. This would include not just acts
14 by Mr. Cioffi or Mr. Tannin, but also acts that they caused
15 others to take that materially further the ends of the
16 conspiracy that we said they have to be unanimous about that
17 particular act or acts.

18 And that came from Roper, so that was what was added
19 when we discussed that before.

20 When we charged on the securities fraud, we didn't add
21 that qualifying language. We just said any act in furtherance
22 of the crimes charged, in the securities count. My sense of it
23 is the same thing would apply there.

24 MR. MCGOVERN: I think that's right, Your Honor, we're
25 really reading tea leaves here. The other issue is that they

1 may be asking whether venue has anything to do with the other
2 four, the other three counts.

3 THE COURT: Here's my suggestion. I can go back over
4 the charge with them, for initial purposes. And ask them if
5 there is anything in particular that they have that troubles
6 them, they can come back and ask me.

7 MR. MCGOVERN: I think that's fair. We would just ask
8 that the court identify for the jurors the counts for which
9 venue is not an issue which would be counts four, five and six.

10 THE COURT: Not an issue --

11 MR. MCGOVERN: Because they have -- the defense waived
12 any insider trading and the wire frauds.

13 THE COURT: And the wire frauds, right.

14 Mr. Butswinkas, what's your pleasure?

15 MR. BUTSWINKAS: I think, Your Honor, that we have
16 stated our position with respect to the venue charge, but, it's
17 already been given, it's clear, and I think there is some
18 damager of creating a potential for confusion by inviting
19 follow-up questions from the jury on venue. I would be
20 inclined to just have the jury look at the written charge.

21 THE COURT: I'm going to ask them if there is anything
22 they have further that they want to know about so they can come
23 back? I mean, they can just read the charge themselves. They
24 don't to have me read it back to them, then I have to give them
25 something in addition to say. What about qualifying the

1 securities fraud venue the same way that we did the one for
2 conspiracy, under Roper? Should I go that far?

3 MR. MCGOVERN: I think that is appropriate under the
4 circumstances, and it may be the source of their question,
5 because we do have two separate messages being sent.

6 THE COURT: You would prefer that I not do that?

7 MR. BUTSWINKAS: Yes, I just think it starts to place
8 undue emphasis on certain sentences in the instruction and they
9 are to take the instructions as a whole and --

10 THE COURT: Let's take it step by step, and just in
11 the first instance, just invite them to give me some focus
12 questions, if they have any.

13 Ms. Brune?

14 MS. BRUNE: One thought we had maybe the sending of
15 the note and the sending back of the charge more or less
16 crossed each other. I don't know if it's still obviously a
17 live question for them, now that they have Your Honor's written
18 charge.

19 THE COURT: We'll find out. Let's bring them in.

20 Yes?

21 MR. BUTSWINKAS: I'm sorry. If you're going to talk
22 to them more about venue, I would ask the Court to explain that
23 venue is a constitutional obligation.

24 THE COURT: I'm not going to get into it to that
25 extent. We'll just, in the first instance, read back the

1 charge. I am tempted to add with respect to the security
2 frauds the same qualification applies that we spoke about in
3 term of the conspiracy count, I think that's the law, maybe I
4 won't do that this in first instance, just invite them if they
5 have any other questions to come back. Let's see how it goes.

6 MR. MCGOVERN: Just ask that they be told that the
7 other counts have nothing to do with --

8 THE COURT: I'll do that. In effect that's what I'm
9 saying, it only applies to the securities count and the
10 conspiracy count.

11 Mr. Innelli, do you want to bring the jurors in,
12 please.

13 THE CLERK: Do you want me to mark this as a court
14 exhibit, the testimony that's read back?

15 THE COURT: We're going to mark the testimony of
16 Hartmann that we sent to the jurors as Court Exhibit Number 7.

17 THE CLERK: Seven, yes.

18 (Discussion off the record.)

19 MR. BUTSWINKAS: Your Honor, I think they also asked
20 for a break, did they not?

21 THE COURT: This, I'm not aware of.

22 Mr. Innelli?

23 THE CLERK: Yeah, they asked for a ten-minute break,
24 I've to get a CSO up there for that.

25 THE COURT: Was this a separate note?

1 THE CLERK: Yeah, 3:36. Mark it as a court exhibit?
2 It's just a break. Have to get a CSO.

3 All rise.

4 (Jury enters.)

5 THE CLERK: You may be seated.

6 THE COURT: Please be seated. I hope Mr. Innelli fed
7 you well, and I see you have -- you're busy at work.

8 Let me take the most important thing first. I have
9 this note that you rendered about 20 minutes ago, saying that
10 you would like to a ten-minute break. And Mr. Innelli is
11 arranging to have the proper security people come here for that
12 purpose.

13 THE CLERK: Yes.

14 THE COURT: They'll be here shortly?

15 THE CLERK: Yes.

16 THE COURT: All right, hopefully we'll be able to
17 accommodate that immediately, as soon as we get the necessary
18 personnel that will be here.

19 Then I have the other notes, and a number of them have
20 already been taken care of, mainly the exhibits that you
21 requested have been sent in to you. And the testimony of Kathy
22 Hartmann.

23 Now, let me give you just a cautionary note with
24 respect to that. My policy is to send in two copies of
25 testimony that's requested. Why? Because if somebody is

1 reading it, somebody else should read the other copy because
2 it's so easy to make an inadvertent slip up. This way, I feel
3 confident that you'll be able to guard against that if we have
4 two copies. Hopefully, that has been given to you. And then
5 the last matter that I wanted to attend to is the note where
6 you wanted me to explain venue further.

7 Let me say this, here, initially, that the venue issue
8 applies to the two security counts, and to the conspiracy
9 count. Venue is not involved in respect to the two wire fraud
10 counts and the insider trading count, so you need not be
11 concerned about venue with respect to those three counts.

12 I charged you in respect to the security counts, that
13 you are to consider whether the government has proven venue,
14 and I know you have the charge in front of you, but I'm going
15 to read this back to you and then I'll see whether or not
16 there's anything further we need to talk about. I said that is
17 whether any act in furtherance of, so act -- any act in
18 furtherance of the, you know, trigger words. Any act in
19 furtherance of the crimes charged in counts two and three
20 occurred within the Eastern District.

21 So you look at each of the charges, the charge in
22 count two, separately you have to consider the charge in count
23 three. And you have to then ask yourself with respect to each
24 of those charges whether any act occurred in furtherance of the
25 crimes and in the Eastern District, and I described to you that

1 that means that it includes the boroughs of Queens, Brooklyn,
2 Staten Island and the counties of Suffolk and Nassau. And then
3 I told you that you have to all agree on which act or acts, if
4 any, did occur in furtherance of any of these crimes.

5 So, that sort of repeats basically the charge that I
6 gave you. Then in respect to the conspiracy count, I told you
7 that this means venue in that respect that the government must
8 prove by a preponderance of the evidence. Or just back up. I
9 also told you that the preponderance of the evidence is the
10 standard when we talk about venue, so preponderance of the
11 evidence standard applies to the security counts as well as to
12 conspiracy count and explain to you the difference between the
13 burden of proof when we talk about the preponderance of the
14 evidence on the one hand compared to the more exacting burden
15 of proof beyond a reasonable doubt which applies otherwise to
16 all the elements in this case. I think you understand the
17 burden so I'm not going to repeat that unless you want me to go
18 into that more specifically.

19 With respect to the conspiracy, I said the government
20 must prove by a preponderance of the evidence either that the
21 unlawful agreement was formed, and you remember I explained to
22 you conspiracy, I said the first thing you must determine
23 whether there was an agreement. And that was explained fully
24 in the conspiracy charge. Whether either the unlawful
25 agreement was formed or at that at least one overt act was

1 committed in the Eastern District of New York. With respect to
2 the conspiracy charge, there were these overt acts that were
3 listed and you have to address whether there was an overt act
4 that was committed in the context of the conspiracy charge.

5 And then I explained to you again what the Eastern
6 District of New York and I referred you back to my instructions
7 to define what a preponderance of the evidence was: The lesser
8 standard than proof beyond a reasonable doubt. But I wanted to
9 explain to you the overt acts, supporting venue, need not be
10 one of the six listed in count one. So the fact that you
11 have -- you have determined whether an overt act was
12 established in order to support the conspiracy count, when it
13 comes to venue, you need not focus necessarily on those overt
14 acts, it could be any act. It must be some act taken in
15 furtherance of the charged conspiracy.

16 To that extent it tracks really the essence of what I
17 told you about any act taken in furtherance of the securities
18 counts as well, so it's in furtherance of any act.

19 And then I added in that respect this would include
20 not just acts by Mr. Cioffi and Mr. Tannin but also acts that
21 they caused others to take that materially further the ends of
22 the conspiracy, and I said you have to all agree as to which
23 act or acts that you come to rest with in order to establish
24 venue.

25 All right, so, I don't know whether that helps you,

1 but, just what you can do if there is anything more specific
2 that you need to know, more focused, any particular question
3 that you have in the contours of my explanations of the law,
4 you need to just come back and ask me. I can't read your minds
5 and I don't want to go on and on and on and on and speculating
6 and guessing what you may have specifically in mind. This is
7 sufficient, you know, I think for present purposes, and
8 hopefully that will assist you with your deliberations and then
9 you can continue to do so, and at some appropriate time you let
10 me know how you're coming along, when you wish to go home, how
11 long you wish to stay, and then you're going to have to advise
12 me as to what your pleasures are, and prepare to come back
13 tomorrow. You can also tell me when you want to come back. It
14 doesn't have to be at 10, it could be 9:30, it could be 9, it
15 could be 8:30. I don't want really to start any later than 10,
16 I think 10 should be the outside. But all of that is within
17 your own control, okay. So continue with your deliberations
18 and hopefully, Mr. Innelli, we have somebody here to give these
19 hard-working folks a break now.

20 THE CLERK: Not yet, they're on their way.

21 THE COURT: I'll make sure they get here promptly,
22 continue.

23 THE CLERK: All rise.

24 (Jury exits.)

25 (Time noted: 4:07 p. m.)

1 THE COURT: Okay. Mr. Innelli. You'll mark this
2 Court Exhibit 8, the request for a ten-minute break.

3 (Recess.)

4 THE COURT: Mike, you can bring them and in we get the
5 exhibits for them the first thing tomorrow morning.

6 THE CLERK: Yes.

7 THE COURT: Before they come in here, what's your take
8 on whether or not we should give them off Wednesday or not?

9 MR. MCGOVERN: The government doesn't care. It's
10 perfectly fine, if that's what they want.

11 THE COURT: Mr. Butswinkas?

12 MR. BUTSWINKAS: That's fine with me, Your Honor.

13 THE COURT: Ms. Brune?

14 MR. MCGOVERN: He asked you, Ms. Brune.

15 MS. BRUNE: I don't feel strongly either way, Your
16 Honor, but I think I'm inclined to ask them to work.

17 THE COURT: I'm going to encourage them to come here,
18 but I'm not going to close the door. I have no idea whether
19 somebody may have personal plans or not. I would rather have
20 them go straight forward first. We'll see.

21 THE CLERK: All the exhibits.

22 All rise.

23 (Jury enters.)

24 THE CLERK: You may be seated.

25 THE COURT: Well, you have had a full day, and I have

1 your notes, and let me just identify them. I keep a record of
2 them. Ms. McCoffey (phonetic), I got your name pronounced
3 correctly?

4 JUROR: No, McCoughey, but it's okay, though.

5 THE COURT: McCoughey?

6 JUROR: Yes.

7 THE COURT: I want to commend you. You have a very
8 nice, legible handwriting. I can read them all very nicely.
9 You have done exactly what I've asked you to do. We have the
10 hours that you went in, your notes, the time, and it's very
11 clear.

12 So, Exhibit 8, Court Exhibit 8, we wanted a ten-minute
13 first air break, apparently you never got it, we tried, give
14 Mr. Innelli a clue in advance if you can, takes us a little
15 while to get the security people up here to do that. So,
16 hopefully in the future, we'll be able to accommodate you
17 better.

18 The Court Exhibit Number 9, some members of the jury
19 want Wednesday off because it's a federal holiday.

20 I know it's a federal holiday, but it's, and we honor
21 Veteran's Day, but my own personal preference is to continue to
22 go and I'll tell you why I feel that way. I let the alternates
23 go. And you know, got forbid if somebody gets sick, then, you
24 know, we would be at risk here, so I want to share with you my
25 concerns. I don't want to be arbitrary and keep you from

1 having the day off, but my own preference would be to go
2 straight ahead primarily for that reason.

3 And we'll make it up to you some other time.

4 Exhibit Number 10, we plan to leave at five today, I'm
5 certainly honoring that request and return tomorrow at ten.
6 And then Exhibit Number 11, you wanted to see a number of
7 exhibits, Government Exhibits 38, 39, 40, 41, 42, 571, 48 and
8 Defendant's Exhibit 1969. We have them here for you. I guess
9 it's best that we have them for you tomorrow morning. And Mr.
10 Innelli will arrange to have them brought in to the jury room
11 first thing so you have them prompt here at ten o'clock.

12 So that completes day one of your deliberation.
13 Obviously when you go home, you know, there may be things out
14 there, you know, in the internet world and on the television,
15 on the newspapers because once the jury starts deliberating,
16 sometimes that's looked upon as a news event. So I just want
17 to caution you ever more so to really continue with your
18 wonderful job you have done. Try to avoid any information
19 coming from outside. And get a good night's sleep and we'll
20 see you tomorrow at ten o'clock.

21 THE CLERK: All rise.

22 (Jury exits.)

23 THE CLERK: You may be seated.

24 THE COURT: Well, I guess you can possibly deduce from
25 the note about Wednesday that they're not planning on a quick

1 verdict here. But you never know how a jury is going to go
2 about its deliberations tomorrow.

3 I think Mr. Innelli has your contact information, and
4 we'll give you a buzz as soon as you're needed. And you're all
5 within striking distance of the courthouse, so I guess you
6 wouldn't have to be here at ten, as long as we know where you
7 are.

8 MR. BUTSWINKAS: Thank you, Your Honor. We appreciate
9 that.

10 THE COURT: See you tomorrow.

11 (Trial adjourned to November 10, 2009, at 10 a. m.)
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4	Court Exhibit 1	3169
	Court's Exhibit 2	3169
5	Court's Exhibit 3	3169
	Court's Exhibit 4	3253
6	Court's Exhibit 5	3253
	Court's Exhibit 6	3253
7	Court's Exhibit 7	3258
	Court's Exhibit 8	3264

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